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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

H. JASON GOLD, in his Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in his Capacity as Chapter 7 Trustee for Donna Detrick, and FAST FORWARD, INC.,

Petitioners,

—v.—

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA, and SYLVAN FRIEDMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARTIN E. KARLINSKY, ESQ.
(Counsel of Record)
ROBERT P. STEIN, ESQ.
MICHAEL A. LEVY, ESQ.
ADAM S. ZIFFER, ESQ.
CAMHY KARLINSKY & STEIN LLP
1740 Broadway, 16th Floor
New York, New York 10019-4315
(212) 977-6600

QUESTIONS PRESENTED

Petitioners alleged that they were injured by respondents' scheme to defraud the United States and foreign governments through fraudulent overbilling of freight costs for foreign arms shipments. A federal criminal investigation terminated the scheme, and eventuated in the indictment and conviction of one of the respondents herein and of co-conspirators, as well as the pending indictment of an employee of another respondent. Petitioners sought to recover for a violation of Section 1962(a) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), resulting from the criminal scheme. They suffered economic harm by reason of the respondents' criminal misconduct in April 1990, but they did not discover until March 1991 that respondents' scheme was the source and cause of that injury. Petitioners filed suit in March 1995, within four years of the discovery that respondents caused the injury, but more than four years after discovery of the underlying economic harm. The district court and the court of appeals applied the "injury discovery" rule of RICO accrual to bar petitioners' RICO claims as untimely.

The questions presented are:

1. In order to resolve the conflict among the courts of appeals and with this Court's own precedents, what uniform rule for accrual of RICO claims should the Court adopt?

2. In adopting a uniform rule for accrual of civil RICO claims, should the Court require, at a minimum, that the plaintiff have discovered not merely the occurrence of economic harm, but the source and cause of that injury?

The Court should adopt the accrual rule enunciated in *United States v. Kubrick*, 444 U.S. 111, 120-22 (1979). As applied to this case, that rule requires that a plaintiff have discovered her injury and the source or cause thereof in order to trigger the running of the four-year RICO statute of limitations. Petitioners' claims here were timely under that rule.

On January 10, 1997, the Court granted *certiorari* in *Klehr v. A.O. Smith Corporation*, No. 96-663, which presents the identical questions presented here, but which arises in the context of claims under Section 1962(c) of RICO, not in the context of claims under Section 1962(a). In *Klehr*, petitioners and their *amici* urge the Court to adopt the "last predicate act" rule of accrual, while respondents urge the Court to adopt the "injury discovery" rule without the element of discovery of the *source* of injury. Petitioners ask that the Court grant *certiorari* in this case because, in contrast to *Klehr*, the circumstances of this case present a paradigmatic racketeering claim under Section 1962(a) of RICO, and because this case clearly demonstrates the demarcation between discovery of the underlying racketeering injury and the source of that injury, and thus aptly demonstrates the necessity for and correct application of the proper accrual rule—the *Kubrick* rule—in RICO cases.

Alternatively, petitioners ask that the Court defer consideration of the petition pending the decision in *Klehr*, and then grant the petition, either to resolve the case based upon its decision in *Klehr*, or to remand the case in light of the decision. *See, e.g., Keney v. New York*, 388 U.S. 440 (1967) (granting petition and summarily reversing in light of intervening precedent); *Eckerd Drugs, Inc. v. Brown*, 457 U.S. 1128 (1982) (granting petition, vacating judgment below, and remanding in light of intervening precedent); *Lane v. Smith*, 457 U.S. 1102 (1982).

* * *

LIST OF PARTIES—Rules 14.1(b) and 29.6

A. Parties Originally Named in the District Court.
Plaintiffs originally named in the district court were: Guy R. Detrick, Donna Detrick, Fast Forward, Inc., and Northeast Container Corporation. Neither Fast Forward, Inc. nor Northeast Container Corporation has any parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.6. Defendants originally named in the district court were: Panalpina, Inc., Panalpina Air Freight, Inc., Multi-Modal Freight Systems, Inc., Multi-Modal Freight Systems of Virginia, Sylvan Friedman, American Motor Lines, Inc., Baltimore Freightways, Inc., Blue Star Freight Lines, Inc., General Motor Lines, Inc., Hagerstown Motor Express, Inc., Jennifer Motor Express, Inc., Maryland Transport and Storage Company, Mills Trucking, Inc., National Motor Lines, Inc., New Windsor Express, Inc., South Carolina Motor Express, Inc., Tidewater Trucking Company, Inc., U.S. Motor Express, Inc., U.S. Transport Group, Vista Motor Express, Inc., and John Does 1-10.

B. Changes of Parties in the District Court.
Plaintiffs dismissed Northeast Container Corporation as a plaintiff. Plaintiffs dismissed as defendants all named defendants other than Panalpina, Inc.; Panalpina Air Freight, Inc.; Multi-Modal Freight Systems, Inc.; Multi-Modal Freight Systems of Virginia, and Sylvan Friedman.

C. Changes of Parties in the Court of Appeals.
Petitioners J. Jason Gold and Gordon P. Peyton, respectively the bankruptcy trustees for Guy and Donna Detrick, were substituted as parties-appellant in the stead of the Detricks by contested motion in the court of appeals. *See* App. at 13a-15a.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

H. JASON GOLD, in his Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in his Capacity as Chapter 7 Trustee for Donna Detrick, and FAST FORWARD, INC.,

Petitioners,

vs.

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA, and SYLVAN FRIEDMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

H. Jason Gold, in his capacity as Chapter 7 Trustee for Guy R. Detrick, Gordon P. Peyton, in his capacity as Chapter 7 Trustee for Donna Detrick, and Fast Forward, Inc., petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on March 18, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 108 F.3d 529 (Murnaghan, C.J.), and is reprinted in the appendix hereto at a4 *et seq.*, *infra*. The memorandum order of the United States District Court for the Eastern District of Virginia, Alexandria Division (Hilton, D.J.) has not been reported. It is reprinted in the appendix hereto at a1 *et seq.*, *infra*.

JURISDICTION

Petitioners brought the within RICO action in the United States District Court for the Eastern District of Virginia, Alexandria Division.[1] They invoked federal jurisdiction under 28 U.S.C. § 1331. The district court granted respondents' motions for summary judgment on petitioners' RICO and Virginia state law conspiracy claims and petitioners' cross-motion for summary judgment on state law contract claims. On petitioners' appeal and respondents' cross-appeal, the United States Court of Appeals for the Fourth Circuit entered judgment on March 18, 1997, affirming the district court's order in all respects. No rehearing has been sought. Petitioners invoke the jurisdiction of this Court to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

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[1] The term "petitioners" includes, where the context requires or admits, not only the named petitioners herein, but also the named plaintiffs and appellants, Guy Detrick and Donna Detrick, in, respectively, the district court and the court of appeals.

STATUTE INVOLVED

Section 1962(a) of RICO, 18 U.S.C. § 1962(a), provides, in pertinent part, that:

> [i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Section 1961 of RICO, 18 U.S.C. § 1961, defines "racketeering activity" to include:

> any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud). . . .

Section 1964(c) of RICO, 18 U.S.C. § 1964(c), provides that:

> [a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

STATEMENT OF THE CASE

Introduction

Guy R. Detrick, Donna Detrick, and Fast Forward, Inc. ("Fast Forward") were engaged in the business of providing warehouse services to domestic and international freight forwarders. (JA 201-2, 366)[2] Respondents Sylvan Friedman ("Friedman") and Multi-Modal Freight Systems, Inc. and Multi-Modal Freight Systems of Virginia (collectively, "Multi-Modal") were similarly engaged in the business of freight warehousing, forwarding, and servicing. Respondents Panalpina, Inc., and Panalpina Airfreight, Inc. (collectively, "Panalpina") are substantial international freight forwarders. (JA 194) Petitioners alleged that respondents had devised a scheme to defraud the United States, and had invested the proceeds of their racketeering activity in a RICO enterprise. Petitioners further alleged that they had been driven from their business through and by reason of that investment, thereby causing them injury in violation of Section 1962(a) of RICO. (JA 24) They sought to recover principal damages in the amount of at least $1.5 Million, trebled as permitted by 18 U.S.C. § 1964(c), together with attorneys fees and costs. (JA 57)

The Government Investigation and Criminal Proceedings

Following their discovery of respondents' criminal scheme, but several years before they brought their own case, petitioners took their information concerning the illegal scheme to the agents of the federal government. They met with and assisted the Internal Revenue Service, the Office of the Inspector General of the U.S. Department of State, the Federal Bureau of Investigation, and the Defense Investigatory Service. (JA 808-

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[2] References styled "JA___" are to the pages of the Joint Appendix lodged with the court of appeals.

17, 842) The information petitioners imparted to the government has to date resulted in respondent Friedman's guilty plea on charges arising from the respondents' conspiracy and the indictment and conviction at trial of employees of D.F. Young, Inc. ("D.F. Young"), a co-conspirator also engaged in the freight forwarding business, as well as the continuing investigation of Panalpina and its officers, agents, and employees.[3] (JA 61) Most recently, an employee of Panalpina was indicted on federal income tax evasion charges arising from the scheme that forms the basis of petitioners' claims.[4]

The Criminal Scheme

Petitioners' injury arose from respondents' scheme to defraud the United States and foreign governments in connection with the Foreign Military Sales Program ("FMSP"), a federal program authorized by the Arms Export Control Act, 22 U.S.C. § 2751 *et seq.*, and the Foreign Military Sales Authorizations Act, 22 U.S.C. § 2761 *et seq.* Both Acts provide for the sale and shipment of domestic surplus military equipment to allied foreign governments. The transportation requirements of the FMSP provided respondents with the opportunity to implement a corrupt scheme. (JA 730) Respondents Friedman and Multi-

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[3] Predicated upon his role in the government's investigation, Guy Detrick filed a *qui tam* action, pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.* The district court recognized the indisputable contribution made by Detrick, but dismissed his complaint, holding that Detrick lacked sufficient evidentiary detail of the fraud to qualify as a relator. *United States of America ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010 (E.D. Va. 1995). Detrick appealed from the order of dismissal, and settled the case with the United States while on appeal.

[4] The Court may take judicial notice of this indictment under Fed. R. Evid. 201. *United States of America v. Kevin Hodgson*, United States District Court, Eastern District of Virginia, Alexandria Division, Docket No. 97 CR 108 (filed March 13, 1997).

Modal conspired with D.F. Young to inflate charges for inland freight of military equipment, sometimes threefold, and to send the false invoices abroad for payment. (JA 476-82) Friedman and his co-conspirators divided the proceeds of their unlawful scheme and then invested a portion of the racketeering "profits" in the illicit business enterprise constituted by respondents—an "association in fact enterprise" within the meaning of RICO. (JA 32, 38, 499, 508-12, 517-19, 755-58, 765)

In Spring 1989, Panalpina joined the conspiracy. (JA 538-39, 791) In furtherance thereof, charges for inland transportation of freight under an FMSP contract between Panalpina and a foreign government were inflated by as much as three hundred percent. (JA 32, 782-88, 791, 869-70, 879-80) Respondents concealed the overcharges from the foreign government (and from the United States government), and the racketeering activity continued, unabated and undetected, while respondents reinvested the proceeds in the racketeering enterprise. (JA 525-40, 793)[5]

Petitioners Become the Unwitting Victims of the Scheme

Friedman eventually became dissatisfied with the level of illicit profits from the scheme. He complained to Panalpina that Multi-Modal was not being rewarded sufficiently. (JA 869-80) Respondents contrived a solution: Friedman would replace petitioners and assume control of the warehousing operation so that he could fraudulently overbill for warehouse services as well. Petitioners—who stood in the way of this new

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[5] Panalpina officers and employees who conspired to inflate these invoices refused to testify in this civil action, each invoking the Fifth Amendment privilege against self-incrimination. (JA 845, 864, 882, 921) This invocation was not surprising, as respondent Friedman (who had pled guilty) testified that he had bribed Panalpina employees to participate in the scheme. (JA 513-14, 877)

objective—became the direct, but unwitting, targets of the respondents' racketeering activity. (JA 33-34, 853-57, 859, 872-74, 880, 913-14, 932-33) Petitioners had contracted with Panalpina to provide warehouse handling services. (JA 309, 939, 664, 668-83) (This contract is hereinafter called the "Warehouse Contract.") In 1989 and early 1990, petitioners' formerly sound commercial relationship with Panalpina inexplicably began to deteriorate. (JA 948) Panalpina demanded sharp discounts (JA 594-607) and increases of staff wholly unnecessary to performance of the Warehouse Contract. (JA 627-33) It insisted on "charging back" petitioners for expenses unrelated to the Warehouse Contract (JA 608-27), declined to take reasonable steps to assist in the performance of the Warehouse Contract, and refused to lease needed additional space in the warehouse for performance of the Warehouse Contract. (JA 948, 633-36) Because of these actions, petitioners' costs became unreasonably high, and the Warehouse Contract became unprofitable.

Petitioners did not know that respondents used the proceeds of their racketeering activity to subsidize below-market rates and to pay "kickbacks" to Panalpina's senior employees to enlist them in the plan to force out petitioners. (JA 594-96, 606-7, 862, 917-18, 513-14) Although petitioners sought an explanation for the economic pressures to which they were subjected, their inquiries yielded only deceitful commercial justifications from Panalpina. Panalpina falsely asserted that Friedman had offered to perform the same work at lower rates, and insisted that petitioners match the rate if they wanted to retain the Warehouse Contract. Petitioners accordingly reduced their rates on several occasions, induced by these false statements, but this served merely to erode further their profits. (JA 593-607, 839) By April of 1990, this unlawful competition, subsidized by illegal gains, forced petitioners to abandon the Warehouse Contract. (JA 636-40) Petitioners had no indication that they were the object of a criminal scheme, much less that

one existed. They accordingly concluded that Multi-Modal, by virtue of its size and other business advantages, posed a legitimate competitive challenge that their small company could not meet. The proceeds from the illegal scheme continued to flow into respondents' treasuries, now augmented with the gains from the warehousing services formerly performed by petitioners. (JA 547-49, 641-42, 567-68, 577-79, 584-89)

Petitioners' Discovery of the Source of their Injury

On March 11, 1991, one of petitioners' former employees approached Guy Detrick with a Multi-Modal invoice containing a billing discrepancy so obvious as to suggest deliberate falsity. (Detrick worked for Friedman after he and Fast Forward had abandoned the Warehouse Contract.) Detrick for the first time began to suspect that respondents were engaged in criminal activities with respect to the FMSP, and surmised that he and his company might have been a victim of that criminal scheme. (JA 45-46, 643-49) Armed with knowledge of the one false invoice, Detrick entered the copy room in the Panalpina warehouse. There he saw a stack of similar documents, including a freight bill "that looked like it had been done in a cheap print shop, that once again for the second time that day had the exact same information but a huge mark-up on the price." (JA 644-48) Detrick continued his investigations and only then confirmed his suspicions that respondents and others were engaged in unlawful activity.

Petitioners had sustained economic harm—the loss of the Warehouse Contract—almost a year before, but had no ability to discover respondents' conspiracy and no reason to connect that conspiracy to the harm they had suffered. With the discovery of the source of the injury, petitioners were able to commence an investigation to determine the facts. Petitioners' cooperation with the government in the criminal investigation commenced soon thereafter, and the indictments, guilty pleas,

and convictions later followed. Petitioners commenced this action on March 9, 1995. (JA 648-49, 231-42, 256-79)

The Decision of the District Court

The district court granted summary judgment to respondents, finding that the RICO claims were time-barred by the four-year civil RICO statute of limitations. In reaching this determination, the district court concluded that under the "injury discovery" rule, petitioners' RICO claims had accrued in April 1990, at the moment petitioners sustained economic loss in the forced abandonment of the Warehouse Contract. (App. 1a-3a)

The Decision of the Court of Appeals

In affirming the judgment of the district court, the court of appeals held that under the "injury discovery" rule, petitioners' RICO claims had accrued at the moment they knew they had sustained economic loss, without regard to whether they knew or understood the source of that injury. (App. 22a-25a) The court of appeals rejected petitioners' contention that the "injury discovery" rule, as enunciated by the Fourth Circuit in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), worked an injustice unless, by virtue of adherence to the "source" element of the rule, a plaintiff could reasonably be charged with actual or constructive notice that *someone* was responsible for an injury, and thus that the injury was actionable. Under the court of appeals' formulation, a plaintiff's knowledge of a bare economic loss, without more, marks accrual of a RICO claim. The court of appeals refused to incorporate the "source" element required by this Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979).

* * *

REASONS FOR GRANTING THE WRIT

I. The Holding Below Conflicts With This Court's Articulation Of The Federal "Injury Discovery" Rule Of Accrual And With The Holdings Of Other Circuit Courts Of Appeals Regarding The Appropriate RICO Accrual Rule.

As petitioners urge below, the accrual rule formulated by the Court in *United States v. Kubrick*, 444 U.S. 111 (1979), a rule that triggers the statute of limitations when a putative plaintiff discovers both his injury and its source or cause, is the most appropriate rule of accrual for claims under civil RICO. This rule strikes a fair balance between a diligent plaintiff's right to investigate and prosecute claims, and a defendant's right to be free of stale actions. As the facts of this case make abundantly clear, bona fide racketeering activity is not readily discernable from the discovery of economic harm alone. In this regard, civil RICO claims bear a compelling similarity to the tort of medical malpractice from which the *Kubrick* rule arose. For these reasons and others discussed below, the *Kubrick* rule is in all respects an apposite and fair uniform accrual rule for civil RICO claims, consistent not only with the remedial purposes of RICO but also with settled notions of accrual and tolling of federal claims.

A. The Federal "Injury Discovery" Rule Enunciated By *Kubrick* Is The Appropriate Rule Of Accrual Here.

In *Kubrick*, the Court granted *certiorari* to decide when a medical malpractice claim against the United States, asserted under the Federal Tort Claims Act, accrues for purposes of the statute of limitations. The Court articulated the issue as follows:

> [w]hether the claim 'accrues' within the meaning of the [Federal Tort Claims] Act when the plaintiff knows both the existence and the

> cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice.

Id. at 113. The court of appeals had held that the claim would accrue for limitations purposes only when the plaintiff knows that the injury he has sustained gives rise to legal rights—acts constituting medical malpractice—against a defendant. *Id.* at 121.

In rejecting the view advanced by the court of appeals, the Court held that the claim accrues, and the statute of limitations begins to run, when the plaintiff knows of his injury and its source. The Court noted that there is a significant demarcation in the medical malpractice context between knowledge of the injury and its source or cause, which "may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain" (*id.* at 122), and knowledge of the legal rights that flow from such injury and identification of its source. In the former case, once an injury is manifest and a putative plaintiff knows its source, he is in possession of all relevant facts necessary to investigate the wrong, and may be reasonably held to a standard of diligence in doing so. If the former conditions are satisfied, there is little reason to permit a plaintiff to postpone accrual, and myriad reasons—among them avoiding the assertion of stale claims and permitting repose for the sake of certainty—to require plaintiff then to act within the statutory limitations period. Predicated on this analysis, the Court held there that the claim accrues and the limitations period begins to run when the plaintiff knows of his injury and its source. *Id.* at 122-24.

The *Kubrick* rule is consistent with the general federal rule of accrual, but in one respect it is less restrictive. Under the "traditional" federal accrual rule, a claim accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action. *E.g.*, *Cullen v. Margiotta*, 811 F.2d 698, 725 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987). The

"traditional" rule thus triggers the statute of limitations when the plaintiff knows of the injury he has sustained, without regard to his knowledge of the source or cause of the injury. Nor does the rule require any knowledge that the injury is an actionable one. *Kubrick*, in contrast, requires that two conditions be met: (1) knowledge of injury and (2) knowledge of the source of the injury. As the Court there held, only the confluence of the two conditions is suggestive enough to require that a putative plaintiff investigate further in order to prosecute a claim, and only that quantum of knowledge is sufficient fairly to charge a plaintiff with the requirement that he exercise due diligence in detecting the underpinnings of the claim and bringing suit.[6]

The policies that justify a less restrictive approach to claims under the Federal Tort Claims Act also apply to RICO claims. While RICO injury is economic in nature, and thus perhaps easier to recognize than a latent injury resulting from medical malpractice, the source or cause of a RICO injury is all the more difficult to discern. A RICO claim arises from

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[6] The *Kubrick* rule also is consistent with the RICO accrual rule adopted by the Eleventh, Tenth, Eighth, and Sixth Circuits, but in those circuits the courts of appeals have added the element of "pattern," apparently in recognition of the difficulty of ascertaining the existence and nature of the "pattern" element of the RICO offense. In those circuits, a RICO claim accrues when a plaintiff discovers or has reason to discover not only his injury but also the source thereof and the fact that the injury was part of a "pattern" of racketeering within the meaning of RICO. *See Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 238 (8th Cir. 1996), *cert. granted*, ___ U.S. ___ (1997); *Caproni v. Prudential Securities Incorporated*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *rev. on other grounds, Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson*, 501 U.S. 350, 354 n.1 (1991); and *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). However great that difficulty, once a plaintiff may be charged fairly with knowledge of the injury and its source, he may also fairly be put to the task of investigating the existence of such a pattern.

criminal misconduct, and the details of its commission are typically, and inherently, covert. RICO activity is frequently attended by conduct designed to mislead or to impede government investigators and private plaintiffs alike in detecting a criminal scheme. Like the details regarding knowledge of the source and cause of an injury resulting from the tort of medical malpractice, knowledge of the source and cause of a RICO injury often is "in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Kubrick* at 122.

There are strong parallels between a RICO claim and a tort claim, parallels strong enough to suggest that a court-crafted rule that applies to the one may also apply to the other. A RICO claim was unknown at common law, and thus may not be characterized strictly as a tort. However, the common law (and our modern courts applying common law) recognized that violation of a criminal statute may give rise to civil liability in tort. *See generally* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 36 (5th ed. 1984); *Cort v. Ash*, 422 U.S. 66 (1975). Similarly, the conduct that underlies RICO activity is tortious in nature. These factors, in addition to the fact that the *Kubrick* rule is consistent with long-settled federal law, argue strongly in favor of its adoption in the RICO context. The tort accrual standard of *Kubrick* is an appropriate one to import into the RICO arena.

Application of that rule to the case at bar not only illustrates the fundamental fairness of the rule, it also mandates reversal of the judgment of the court of appeals. Here, petitioners sustained harm when forced to abandon the once-profitable Warehouse Contract. There could have been a multitude of causes for that economic loss; petitioners attributed their loss to legitimate and fair competition. In their case, knowledge of the harm—the bare fact of economic harm without an equivalent indication that it might constitute a legally cognizable injury—was not sufficient to start the statute of

limitations running. To the contrary, only the additional element of the identification of the source of that injury would trigger the statute of limitations. Petitioners "discovered" their loss in April 1990, when they were forced to relinquish the Warehouse Contract, but petitioners did not discover the source of that injury—respondents' criminal wrongdoing and the unfair subsidization of competition with the proceeds of that wrongdoing—until March 1991. Petitioners brought their case within four years of *that* discovery.

B. The "Injury Discovery" Rule As Applied By The Fourth Circuit Is Inconsistent With The *Kubrick* Rule.

The "injury discovery" rule applied by the Fourth Circuit here (and the "injury discovery" rule adopted by other circuits) is contrary to *Kubrick*. Under that rule, enunciated in the Fourth Circuit in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987), the court of appeals misapplied the accrual test to trigger the statute of limitations at the moment that petitioners "discovered" they had sustained an economic loss—that is, at the moment they abandoned the Warehouse Contract. As applied by the Fourth Circuit, therefore, the "injury discovery" rule is tantamount to a rule that starts the running of the statute before a putative plaintiff can fairly be held to inquiry notice of the existence of a RICO claim. Because discovery of the source or cause of the wrong is not required, the rule does not incorporate a nexus to the legal claim, and thus may operate to divest a putative plaintiff of his or her rights before the plaintiff is even aware that he or she *has* such rights. As such, it is fundamentally unfair and in conflict with the rationale of *Kubrick*.

Under *Kubrick*, in contrast, knowledge of the injury and its source is a condition to the accrual of the claim. The rationale behind this rule rests upon the difficulty in ascertaining the source of the injury. No argument can be advanced that a

RICO plaintiff faces less difficulty than a medical malpractice plaintiff in ascertaining the source of the wrong, as the facts of this case make clear. Yet disparate articulation and application of accrual standards punishes the former by cutting off her rights, while leaving the latter free to pursue claims when sufficient information has come to light to make it reasonable and seemly that he be required to do so. No lesser right should be accorded a RICO plaintiff than a federal tort claim plaintiff.

Once a plaintiff is aware that he has sustained an economic loss, and that the loss was caused by a putative defendant, it is reasonable to put the plaintiff to the burden of exercising diligence to investigate, to retain counsel, and to bring suit within the limitations period. To the contrary, a rule of accrual that would start the statute of limitations running before both conditions were satisfied, while it would have the virtue of certainty, is a rule that would foreclose meritorious claims and would deny to putative plaintiffs the right to bring suit under RICO before the plaintiff was even aware that he or she had rights that could be addressed under the statute. The "injury discovery" rule of the Fourth Circuit, applied here to bar petitioners' claims, does precisely that. As applied to the case at bar, the rule operated to divest petitioners of their rights four years from the date they sustained economic harm, but not four years from the date when they knew they had been injured and knew the source of that injury. Considerations of fundamental fairness alone suggest that the statute of limitations not run before the putative plaintiff knows he may investigate a claim. Any other rule would be unduly restrictive, and inconsistent with the remedial nature of RICO.

C. The Accrual Rules Adopted By The Circuits Are In Conflict With One Another And With The *Kubrick* Rule.

The "injury discovery" rule of the Fourth Circuit is not only in conflict with the federal "injury discovery" rule, it is also in conflict with the accrual rules adopted by other courts of appeals. The courts of appeals have struggled to articulate a uniform standard, but their struggle has resulted only in sharp disagreement as to the proper rule. No court of appeals has crafted a fair and certain rule that is firmly grounded in this Court's jurisprudence, a rule such as the one petitioners urge the Court to adopt.

Although their formulations are slightly different and are sometimes unclear, the United States Courts of Appeals for the First, Second, Fourth, Fifth, Seventh, and Ninth Circuits hold that a RICO claim accrues when the plaintiff discovers or should have discovered the injury underlying the RICO cause of action. *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987); *La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992) (purportedly following *Kubrick*); and *Beneficial Std. Life Insurance Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988).

The United States Courts of Appeals for the Sixth, Eighth, Tenth, and Eleventh Circuits hold that a RICO claim accrues when the plaintiff discovers or should have discovered both his injury and its source, and the defendant's pattern of racketeering activity. *Caproni v. Prudential Securities Incorporated*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *rev. on other grounds, Lampf, Pleva, Lipkind,*

Prupis, & Petigrow v. Gilbertson, 501 U.S. 350, 354 n.1 (1991); and *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). The Third Circuit subscribes to the "last predicate act" rule in which accrual awaits the last predicate racketeering act of defendants. *Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991).

All of these rules share a common attribute—they are in conflict with the rule enunciated by this Court in *Kubrick*. Petitioners say that *Kubrick* is the right rule for RICO accrual.

II. This Case Presents Apposite And Compelling Factual Circumstances In Which To Decide An Important Question Of Federal Law And To Resolve The Conflict Among The Circuits As To That Question.

In *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Court promulgated a uniform limitations period for RICO claims. The Court there rejected application of analogous state limitations period to RICO in order to prevent forum shopping, promote certainty in application, and avoid complex, time-consuming, and costly litigation. For much the same reasons, it is no less desirable for the Court to promulgate a uniform and certain rule of accrual for RICO claims. The existing regime—with different circuits applying different accrual rules—encourages forum shopping, results in virtually constant relitigation of the same issue, leads to continuing uncertainty for litigants, and, worse, poses the possibility that the accrual rules of some circuits may result in unduly short periods of time to bring RICO claims, thus "thwart[ing] the legislative purpose of creating an effective remedy" for those injured by reason of a violation of the statute. *See Agency Holding* at 154.

This case involves a paradigm of civil racketeering activity, and thus presents apposite and compelling factual

circumstances in which to promulgate an appropriate uniform accrual rule. Here, there are underlying criminal convictions for defrauding the United States and foreign governments. As a result, the conduct in violation of RICO is all the more certain and concrete, and is all the more clearly true racketeering within the meaning of RICO. This is not a mere breach of warranty claim dressed in the clothes of a RICO violation. To the contrary, in this case, absent the private claim expressly provided by RICO, petitioners would have had no common law claim that would have provided an effective remedy. This case presents just the kind of unlawful conduct that RICO was intended to eradicate. In short, this case presents a clear picture of a Section 1962(a) RICO claim in the context of actual criminal wrongdoing for which respondents have been held criminally responsible.

Similarly, this case presents a clear and delineated example of the development of a genuine RICO claim and, in that context, of how petitioners' knowledge concerning their injury and its source arose. In this case there is a clear demarcation between discovery of the mere occurrence of economic harm—what the court of appeals termed the discovery of "injury" and held, without more, to be the triggering event—and discovery of the source or cause of that injury, the event which triggered actual inquiry into the claims ultimately asserted. In this case, what appeared at first to be the result of legitimate competition or, at worst, a simple breach of contract claim, was revealed by passage of time and the discovery of the source of the injury to be a complex RICO scheme arising from a conspiracy to defraud the United States.[7] Simply stated, the

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[7] Unlike most civil RICO claims, this case arose under Section 1962(a) of RICO. In contrast to claims arising under Section 1962*(c)*, in which the conduct of the RICO enterprise causes the harm, here the injury was the result of investment of the proceeds of racketeering in the RICO enterprise. Thus,

(continued...)

facts here squarely present the conflict between the "injury discovery" rule as enunciated by the Fourth and other circuits, and the "injury plus source discovery" rule enunciated by this Court in *Kubrick*. For all these reasons, this case is an appropriate vehicle by which to announce an accrual rule which will govern RICO.

Finally, that the question presented in this case is an appropriate one for review by this Court has been made clear by the Court's actions in the last year. The Court has previously granted writs of *certiorari* to review the central question presented here in *Grimmett v. Brown*, No. 95-1723, and in *Klehr v. A.O. Smith Corporation*, No. 96-663. We do not reiterate the additional arguments advanced by petitioners there in support of their petitions as the granting of *certiorari* in those cases would appear to indicate that the Court wishes to resolve the question presented.

III. The Pendency Of *Klehr* Mandates The Grant Of *Certiorari* In This Case.

The Court granted *certiorari* in *Klehr v. A.O. Smith Corporation*, No. 96-663, on January 10, 1997, to decide the identical question presented here, and heard argument in that case on April 21, 1997. The pendency of *certiorari* in *Klehr* bears significantly on the Court's treatment of the instant petition. In this case, however, the dispositive question turns upon the distinction between discovery of the RICO injury alone, and the discovery of the source of that RICO injury. In *Klehr*, by contrast, the Court may resolve the case on its facts simply by holding that the "last predicate act" rule is not the

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[7] (...continued)
the injury was more attenuated, more latent, and hence more difficult to detect. In this context, fairness dictates that accrual await discovery not only of injury, but also of its source.

proper RICO accrual doctrine. While in *Klehr* the conduct which harmed plaintiffs occurred in the 1970s, and plaintiffs waited almost two decades to bring suit, in this case petitioners brought their suit within four years of the date they discovered the source of their RICO injury. This case, therefore, provides different, and more compelling, factual circumstances, circumstances of the type that arise in the majority of RICO cases.

In addition, apart from the position apparently taken by a single *amicus* (*see* Brief of Washington Legal Foundation, the Manufacturers Alliance, and The Allied Education Foundation as *Amici Curiae* in Support of Respondents, *Klehr* (No. 96-663)), neither the parties in *Klehr* nor their numerous other *amici* urge the rule petitioners urge here. At the very least, this case provides the Court with a vehicle to elucidate its holding on RICO accrual in a setting that will have more pertinence to future RICO cases. Finally, because this case presents the question as to RICO accrual in a concrete setting involving true racketeering activity, the results here will more reliably reflect the policies underlying RICO, and will simultaneously further the goal of certainty in application of the rule this Court enunciates.

In any event, the Court should grant *certiorari* pending the outcome in *Klehr* because the holding in *Klehr* may determine the outcome here. Alternatively, petitioners ask that the Court defer consideration of this petition pending the decision in *Klehr*. Predicated upon the outcome in *Klehr*, the Court may grant the petition and summarily reverse. *See, e.g.*, *Keney v. New York*, 388 U.S. 440 (1967). Alternatively, the outcome in *Klehr* may support vacatur of the judgment of the court of appeals and a remand to that court in light of the Court's action in *Klehr*. *See, e.g.*, *Eckerd Drugs, Inc. v. Brown*, 457 U.S. 1128 (1982).

CONCLUSION

For the various reasons set forth herein, this petition for a writ of certiorari should be in all respects granted.

Respectfully submitted,

MARTIN E. KARLINSKY, ESQ.
(Counsel of Record)
ROBERT P. STEIN, ESQ.
MICHAEL A. LEVY, ESQ.
ADAM S. ZIFFER, ESQ.
CAMHY KARLINSKY & STEIN LLP
1740 Broadway, 16th Floor
New York, New York 10019-4315
(212) 977-6600

Attorneys for Petitioners

May 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

GUY R. DETRICK, et al.,	)	
	)	
Plaintiffs,	)	Civil Action No. 95-306-A
	)	
v.	)	
	)	
PANALPINA, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

This matter comes before this Court on the Defendants' Motions for Summary Judgment; the Defendant Panalpina, Inc.'s Motion to Strike Plaintiffs' Expert Witnesses; the Defendant Panalpina, Inc.'s Objections to the Magistrate Judge's Order Requiring Panalpina to Supplement an Interrogatory Response; the Plaintiffs' Motion for Summary Judgment on the Counterclaim; the Plaintiffs' Motion for an Order Precluding Panalpina, Inc. and Panalpina Airfreight, Inc. from Using Documents Obtained in Violation of the Scheduling Order; and the Defendant Panalpina, Inc.'s Cross-Motion Requesting Leave to Subpoena Checks from Signet Bank.

In their second Motion for Summary Judgment, the Defendants argue that the two counts in the Plaintiffs' Complaint arising under the Racketeer Influenced and Corrupt Organization Act ("RICO") and the one count arising under the Virginia Conspiracy to Injure Another in Trade, Business, or Profession Statute are time-barred due to the expiration of the applicable statutes of limitations. With regard to the RICO counts, the Court finds that the statute of limitations is four years. The Plaintiffs' terminated an at-will contract with Panalpina in April, 1990. The

Plaintiffs allege that Defendant Panalpina forced them out of this contract by inducing them to renegotiate the contract rates during 1988 and 1989 so that they could pursue a "rebilling" scheme with Defendant Friedman who replaced the Plaintiff. Panalpina then hired the Plaintiffs as employees and in March, 1991 they discovered evidence of rebilled invoices. They assert that the Defendants fraudulently concealed this illegal activity by hiring the individual Plaintiffs and hiring Plaintiff Fast Forward to perform a new secret-level warehousing contract, thus preventing the Plaintiffs from discovering their cause of action despite due diligence. This conduct, Plaintiffs assert, operated to prevent them from becoming suspicious by lulling them into a false sense of well-being and the statute should begin to run in March, 1991 and not April, 1990.

The only evidence presented by the Plaintiffs is that the Defendants hired Plaintiff Guy Detrick and provided him with a desk in the warehouse. The Plaintiffs continued to have access to the same warehouse containing the fraudulent invoices. The Plaintiffs present no evidence of any acts of fraudulent concealment, but rather presents evidence that Panalpina hired and put the Plaintiffs in the very warehouse where they could have access to the records they claim were needed to discover the fraud. The Court finds this evidence insufficient to constitute fraudulent concealment. *See Pocahontas Supreme Coal Co. v. Bethlehem Steel*, 828 F.2d 211 (4th Cir. 1987); *Weinberger v. Retail Credit Co.*, 498 F.2d 552 (4th Cir. 1974). The statute of limitations began to run in April, 1990 on the RICO claims. This Complaint was not filed until March, 1995 which exceeds the four year statute.

With regard to the Virginia conspiracy count, the Court finds the applicable statute of limitations to be five years. The Plaintiffs cause of action accrued at the time that they first suffered *any* damage resulting from acts committed in furtherance of the conspiracy. *Eshbaugh v. Amoco Oil Co.*, __ Va. __, 360 S.E.2d 350 (1987). The Plaintiffs allege they were injured by the Defendants insistence that they lower rates and increase staffing levels. There is no dispute in the evidence that the lowering of rates and increased staffing occurred in early 1989 at the latest.

The Plaintiffs commenced this action in March, 1995, more than five years after the cause of action accrued, and is time-barred.

Since the Court has found that the Plaintiffs have not timely filed their claims, it is unnecessary to address the other motions. For the reasons stated, it is hereby

ORDERED that the Defendants' Motion for Summary Judgment is GRANTED and this case is DISMISSED.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
October 26, 1995

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2937

GUY R. DETRICK; DONNA DETRICK;
FAST FORWARD, INCORPORATED,

Plaintiffs-Appellants,

—and—

NORTHEAST CONTAINER CORPORATION,

Plaintiff,

—v.—

PANALPINA, INCORPORATED; PANALPINA AIR FREIGHT, INCORPORATED; MULTI-MODAL FREIGHT SYSTEMS, INCORPORATED; MULTI-MODEL FREIGHT SYSTEMS OF VIRGINIA; SYLVAN FRIEDMAN,

Defendants-Appellees,

—and—

AMERICAN MOTOR LINES, INCORPORATED; BALTIMORE FREIGHTWAYS, INCORPORATED; BLUE STAR FREIGHT LINES, INCORPORATED; GENERAL MOTOR LINES, INCORPORATED; HAGERSTOWN MOTOR EXPRESS, INCORPORATED; JENNIFER MOTOR EXPRESS, INCORPORATED; MARYLAND TRANSPORT AND STORAGE COMPANY; MILLS TRUCKING, INCORPORATED; NATIONAL MOTOR LINES, INCORPORATED; NEW WINDSOR EXPRESS, INCORPORATED; SOUTH CAROLINA MOTOR EXPRESS, INCORPORATED; TIDEWATER TRUCKING COMPANY, INCORPORATED; U.S. MOTOR EXPRESS, INCOR-

PORATED; U.S. TRANSPORT GROUP; VISTA MOTOR EXPRESS, INCORPORATED; JOHN DOES, 1-10,

Defendants.

No. 95-3074

GUY R. DETRICK; DONNA DETRICK; FAST FORWARD, INCORPORATED,

Plaintiffs-Appellees,

—and—

NORTHEAST CONTAINER CORPORATION,

Plaintiff,

—v.—

PANALPINA, INCORPORATED; PANALPINA AIR FREIGHT, INCORPORATED,

Defendants-Appellants,

—and—

MULTI-MODAL FREIGHT SYSTEMS, INCORPORATED; MULTI-MODEL FREIGHT SYSTEMS OF VIRGINIA; SYLVAN FRIEDMAN; AMERICAN MOTOR LINES, INCORPORATED; BALTIMORE FREIGHTWAYS, INCORPORATED; BLUE STAR FREIGHT LINES, INCORPORATED; GENERAL MOTOR LINES, INCORPORATED; HAGERSTOWN MOTOR EXPRESS, INCORPORATED; JENNIFER MOTOR EXPRESS, INCORPORATED; MARYLAND TRANSPORT AND STORAGE COMPANY; MILLS TRUCKING, INCORPORATED; NATIONAL MOTOR LINES, INCORPORATED; NEW WINDSOR EXPRESS, INCORPORATED; SOUTH CAROLINA MOTOR EXPRESS, INCORPORATED; TIDEWATER TRUCKING COMPANY,

INCORPORATED; U.S. MOTOR EXPRESS, INCORPORATED; U.S. TRANSPORT GROUP; VISTA MOTOR EXPRESS, INCORPORATED; JOHN DOES, 1-10,

Defendants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
CLAUDE M. HILTON, DISTRICT JUDGE.
(CA-95-306-A)

Argued: October 31, 1995
Decided: March 18, 1997

Before:

MURNAGHAN and NIEMEYER, *Circuit Judges*,
HARVEY, *Senior United States District Judge*
for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Murnaghan wrote the opinion, in which Judge Niemeyer and Senior Judge Harvey joined.

COUNSEL

Argued:

Robert Paul Stein, CAMHY, KARLINSKY & STEIN, L.L.P., New York, New York, *for Appellants.*

David K. Monroe, GALLAND, KHARASCH, MORSE & GARFINKLE, P.C., Washington, D.C., *for Appellees.*

On Brief:

Martin E. Karlinsky, Allison J. Unger, CAMHY, KARLINSKY & STEIN, L.L.P., New York, New York; Frank C. Razzano, Lisa E. Perry, CAMHY, KARLINSKY, STEIN, RAZANO & RUBIN, L.L.P., Washington, D.C., *for Appellants.*

Andrew T. Goodson, GALLAND, KHARASCH, MORSE & GARFINKLE, P.C., Washington, D.C., *for Appellees Panalpina*;

Max H. Lauten, KRAMON & GRAHAM, P.A., Baltimore, Maryland, *for Appellees Multi-Modal and Friedman.*

OPINION

MURNAGHAN, *Circuit Judge*:

In April, 1990, Guy R. Detrick, Donna Detrick, and Fast Forward, Inc.,[1] abandoned their contract with Panalpina, Inc., and Panalpina Air Freight, Inc. (collectively, Panalpina), under which the Detricks provided warehouse services at Panalpina's Sterling, Virginia facility. The Detricks maintain that Panalpina, Multi-Modal, and Friedman conspired to force them to abandon the contract.

In their first amended complaint, the Detricks alleged various violations of the Racketeering Influenced and Corrupt

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[1] Multi-Modal Freight Systems, Inc., Multi-Modal Freight Systems of Virginia (collectively, Multi-Modal) and Sylvan Friedman (Friedman) are also Appellees in the instant action.

Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, and the Virginia conspiracy statute, Va. Code Ann. § 18.2-500 (Michie 1995). Subsequently, Panalpina counterclaimed against Guy and Donna Detrick alleging that the Detricks provided false invoices in breach of their contractual obligations to Panalpina, and that the Detricks willfully and maliciously conspired to injure Panalpina in its business, in violation of Va. Code Ann. §§ 18.2-499-500 (Michie 1995).

After the close of discovery, the district court granted summary judgment in favor of Panalpina, Multi-Modal, and Friedman on the grounds that the Detricks' RICO and Virginia state law claims were time-barred. On Panalpina's cross-claim, the district court also granted summary judgment in favor of the Detricks on the grounds that Panalpina had offered insufficient evidence that the Detricks breached their contractual obligations, and that Panalpina's conspiracy claim was barred by the intracorporate conspiracy doctrine. The Detricks and Panalpina now appeal. After careful consideration, we affirm in all aspects the decision of the district court.

I.

FACTS AND PROCEDURAL HISTORY

Guy R. Detrick and Donna Detrick are the sole stockholders of Fast Forward, Inc. (Fast Forward), and are majority stockholders of an affiliated corporation known as Northeast Container Corporation (Northeast). Panalpina, an international freight forwarder, arranges for the world-wide transportation of goods on behalf of its customers. Northeast and later Fast Forward, provided warehouse handling services for Panalpina in Herndon, Virginia and Sterling, Virginia, pursuant to informal understandings and later pursuant to written agreements dated October 24, 1988, and September 5, 1989. Pursuant to these agreements, the Detricks were Panalpina's primary warehouse service provider.

In November, 1988, Panalpina was awarded a substantial Foreign Military Sales Program (FMSP)[2] contract for the transportation of arms, weapons, and military equipment in connection with orders placed by the government of Turkey (Turkey or Turkish/FMSP). In Spring, 1989, the Detricks began to process the Turkish/FMSP freight moving through the Sterling warehouse.

At this same time, the relationship between the Detricks and Panalpina began to deteriorate as Panalpina began to demand discounts in fees charged by Fast Forward. In addition, Panalpina sought increases of staff, and insisted on "charging back" the Detricks for expenses not related to the warehouse contract. Panalpina also refused to lease additional space in the warehouse complex needed to accommodate the Turkish/FMSP contract.

As a result of Panalpina's actions, the Detricks' costs increased and the warehouse contract became unprofitable. As such, in April, 1990, the Detricks abandoned the warehouse contract. Contemporaneously, Friedman and Multi-Modal stepped in and using the former Northeast employees and assets Friedman had purchased from the Detricks, began to provide warehouse services to Panalpina at the Sterling site.[3]

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[2] The Arms Export Control Act, 22 U.S.C. § 2751 *et seq.*, and the Foreign Military Sales Authorizations Act, 22 U.S.C. § 2761 *et seq.*, provide for the sale of United States manufactured surplus military equipment to allied foreign governments and for related financial assistance in connection with such sales. The FMSP program, developed pursuant to the statute, is intended to support U.S; allies and to promote the interests of domestic weapons manufacturers. The program imposes on the purchasing country the responsibility to arrange for the shipment of armament, weapons, and military hardware from the United States. The cost of transportation, including freight forwarding, overland trucking, warehousing, and warehouse services within the United States is generally borne or reimbursed by the purchasing government, but in some cases the costs are reimbursed by the United States.

[3] When Guy Detrick sought an explanation from Panalpina about Panalpina's demands, Kevin V. Hodgson, Vice President of Panalpina's Sterling Warehouse, told Detrick; that Friedman offered to do the same work at lower rates.

In May, 1990, shortly after the Detricks abandoned the warehouse contract, Friedman hired Guy Detrick to work in a sales position at Multi-Modal at the Panalpina warehouse in Sterling; Multi-Modal also employed Donna Detrick on a hourly basis during the summer of 1990 to answer telephones and to perform light clerical work. On March 11, 1991, a former Fast Forward employee then employed by Multi-Modal approached Guy Detrick with an invoice containing an obvious billing discrepancy. Later that day, Detrick entered the copy room in the Panalpina warehouse, where he saw a stack of similar documents, including a freight bill "that looked like it had been done in a cheap print shop, that once again for the second time that day had the exact same information but a huge mark-up on the price." Upon further investigation, Detrick confirmed his suspicions that Friedman, Panalpina, and others were possibly engaged in an unlawful rebilling scheme, the object of which was to defraud the United States and foreign governments.[4]

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[4] Facts discovered since 1991, show that in 1988, Friedman and Multi-Modal, acting together with agents of Daniel F. Young, Inc. (D.F. Young), another freight forwarder, devised a "rebilling" scheme to defraud the United States and foreign governments participating in the FMSP. Basically, the scheme involved the inflating of charges for inland freight and charging the foreign governments the inflated rate. The profits from the scheme were divided between D.F. Young and Multi-Modal, 60% and 40%, respectively. As the scheme continued, Friedman formed various shell entities for use in the scheme. The same rebilling scheme was employed on a FMSP contract with Egypt.

In the Spring of 1989, Friedman solicited Panalpina to join the rebilling scheme conspiracy, and the scheme expanded to include the Turkey/FMSP contract, with which Fast Forward were involved. The profits from the inflated freight charges were divided between Panalpina and Multi-Modal, 60% and 40%, respectively. Thereafter, Friedman wanted Multi-Modal to receive more of the ill-gotten gains, and hence, decided that if Friedman could assume control of the warehouse operation presently operated by the Detricks, Friedman would be able to increase the amount of proceeds from the rebilling scheme. As a result, Friedman devised a plan to force the Detricks out of business by subsi-

Following the discovery of the alleged fraud, in March, 1991, the Detricks consulted counsel in an effort to determine whether they had sustained an injury for which the Detricks could sue. The Detricks also met with agents of the Internal Revenue Service (IRS), the Office of the Inspector General of the United States Department of State (OIG), and agents of the Federal Bureau of investigation (FBI) and Defense Investigatory Service (DIS).[5]

On March 9, 1995, the Detricks filed the instant action in the district court alleging that the alleged rebilling scheme, operated by Panalpina, Multi-Modal, and Friedman violated RICO, 18 U.S.C. § 1961 *et seq.*, and the Virginia conspiracy statutes, Va. Code Ann. § 18.2-500 (Michie 1995).[6] Panalpina filed a counterclaim alleging that the Detricks had (1) provided false invoices to Panalpina in breach of their contractual obligations to Panalpina; and (2) conspired willfully and maliciously to injure Panalpina in its business, in violation of

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dizing below-competition rates and paying "kickbacks" to various Panalpina employees.

As the district court noted, all Panalpina's officers and employees who were involved in the rebilling scheme have invoked their Fifth Amendment privileges against self-incrimination.

[5] Some time thereafter, Friedman entered a guilty plea on criminal charges relating to the rebilling conspiracy and employees of D.F. Young were convicted at trial with respect to the rebilling scheme. The investigation of Panalpina and its officers, agents, and employees continues.

[6] In March, 1995, Guy Detrick also filed a *qui tam* action, pursuant to the False Claims Act, 31 U.S.C § 3729 *et seq.*, in the district court in Alexandria, seeking to recover a monetary award for his role as a whistleblower in connection with the rebilling scheme. While Judge Ellis recognized the contribution made by Guy Detrick to the government's investigation, Judge Ellis concluded that Detrick did not possess the evidentiary details of the fraud to qualify for realtor status within the meaning of the False Claims Act. *United States of America ex rel. Guy Detrick v. Daniel F. Young*, 909 F.Supp. 1010 (E.D. Va. 1995). Detrick's appeal is currently pending in the Fourth Circuit.

Va Code Ann. §§ 18.2-499 and 500.[7] At the close of discovery, Panalpina, Multi-Modal, and Friedman moved for summary judgment on two grounds: (1) the RICO and Virginia conspiracy claims were barred by the statute of limitations, and (2) the Detricks lacked standing with respect to the RICO and Virginia conspiracy claims.[8]

On October 26, 1995, the district court denied the motion on the standing ground, but granted summary judgment with respect to the statute of limitations ground. A day later, on October 27, 1995, the district court granted summary judgment in favor of the Detricks on Panalpina's cross-claim finding that Panalpina had failed to present sufficient evidence to sustain its state law claims, and further, that the intracorporate doctrine barred Panalpina's conspiracy claim pursuant to Va. Code Ann. §§ 18.2-499-500.

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[7] According to Panalpina, in August, 1990, Guy and Donna Detrick, as individuals on behalf of Fast Forward, executed a contract with Panalpina for the provision of "classified" warehousing services for freight shipped by Panalpina on behalf of the governments of Turkey and the United Kingdom. As part of their obligations under the contract, the Detricks, on behalf of Panalpina arranged for classified freight to be shipped via air cargo. Sometimes, the Detricks would list themselves as consignee, and invoice Panalpina for reimbursement of the charges.

Panalpina claims that shortly after the Detricks' discovery of the alleged rebilling conspiracy, Panalpina began to receive multiple invoices from Fast Forward requesting reimbursement for the same shipping charges. These invoices disguised the charges for which payment was requested, and Panalpina paid the invoices without noticing that Panalpina had been falsely double-billed.

[8] Previously, on July 7, 1995, The district court denied Panalpina, Multi-Modal, and Friedman's motion to dismiss the complaint without prejudice on statute of limitations and other grounds to allow the parties to proceed with relevant discovery.

II.

The Detricks argue that the district court erred in dismissing their RICO and Virginia conspiracy claims. We now address the Detricks' contentions.

A.

Before turning to the merits of the instant appeal, the court must address Guy and Donna Detrick's, and Fast Forward's Motion to Substitute the Detricks' bankruptcy Trustees, H. Jason Gold and Gordon P. Peyton for Guy and Donna Detrick as Appellants. Panalpina has filed an opposition to the substitution motion arguing that the substitution will unnecessarily complicate the instant appeal. Friedman and Multi-Modal have no opposition to the substitution.[9]

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[9] On August 17, 1992, Donna C. Detrick filed a voluntary petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code, and on December 9, 1992, the Bankruptcy Court entered an order releasing Donna C. Detrick from all dischargeable debts. Subsequently, on May 12, 1993, Guy R. Detrick also filed a voluntary petition for bankruptcy under Chapter 7, and on September 3, 1993, the Bankruptcy Court entered an order releasing Guy R. Detrick from all dischargeable debts. The schedules listing assets and liabilities, and the statements of financial affairs, accompanying each of the Detricks' Chapter 7 bankruptcy petitions did not list the present cause of action, because the Detricks were not aware of their present 1992 and 1993 RICO and conspiracy claims.

On September 15, 1995, the Detricks voluntarily petitioned the bankruptcy court to reopen their cases so they could list the present cause of action, and their creditors could share in any proceeds from the present action. On October 10, 1995, the bankruptcy court entered an order reopening Guy Detrick's bankruptcy; on October 12, 1995, the bankruptcy court reopened Donna Detrick's case stating that the cases should be reopened "to administer a legal cause of action on behalf of the estate." In addition, the bankruptcy court entered an order re-appointing H. Jason Gold and Gordon P. Peyton as Trustees of Guy and Donna Detricks' respective estates. The court also entered orders authorizing the retention of the debtors' attorneys as counsel for the Trustees for the

The Bankruptcy Code defines property of the debtor's estate to include "all legal or equitable interest of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). In *In re Richman*, ___. F.3d ___, 1997 WL 12117 (4th Cir. Jan. 15, 1997), the Fourth Circuit stated that "[a]s a general matter, in a Chapter 7 proceeding, the trustee alone has standing to raise issues before the bankruptcy court and to prosecute appeals. A trustee is the representative of the bankrupt's estate and has the capacity to sue or be sued." *Id.* at *2. Moreover, the court noted that "[o]nce appointed, the trustee becomes the estate's 'proper party in interest, and the only party with standing to appeal the bankruptcy court's order.' " *Id.* citing *In re Eisen*, 31 F.3d 1447, 1451 n.2. (9th Cir. 1994); *see also Jones v. Harrell*, 858 F.2d 667, 669 (11th Cir. 1988) (trustee in bankruptcy succeeds to all causes of action held by the debtor and debtor lacks standing to pursue those causes of actions); 11 U.S.C. § 323(a)[10] (trustee becomes the sole representative of the estate). In addition, the decision whether to pursue a claim or not is vested within the trustee's discretion. *See In re Louden*, 106 B.R 109, 112 (Bankr.E.D.Ky. 1989) ("It is the trustee and only the trustee who may, in the exercise of his sound judgment and discretion, attempt to reduce to judgment causes of action which are the property of the debtors' estate.") In exercising his/her judgment and discretion, the Trustee has three choices with respect to pending actions by the debtor: (1) intervene and assume prosecution as trustee, (2) consent to prosecution by the debtor for the benefit of the estate, or (3) decline prose-

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purpose of pursuing the present action. *See* 11 U.S.C. § 327(e) ("The trustee, with the court's approval, may employ, for a specified purpose, . . . an attorney that has represented the debtor, if in the best interest of the estate . . .").

[10] 11 U.S.C. § 323 provides:

(a) The trustee in a case under this title is the representative of the estate.

(b) The trustee in a case under this title has capacity to sue and be sued.

cution. *See* 1 ROBERT E. GINSBURG & ROBERT D. MARTIN, GINSBURG & MARTIN ON BANKRUPTCY § 12.06[G] (4th ed. 1996); Fed.R.Bankr.Pro. 6009; *American Foods, Inc. v. Dezauche*, 74 F.Supp. 681, 682 (W.D.N.Y. 1947).

As Panalpina noted before the district court, since the Detricks have filed for bankruptcy protection, the Detricks, in their individual capacities, lack standing to pursue the instant lawsuit, as the Detricks' claims now belong to the bankruptcy Trustees. The district court denied Panalpina's motion for summary judgment on the standing issue reasoning that "I am not going to dismiss this claim or grant summary judgment on this claim because of standing in this posture when the Bankruptcy Court has reopened it and they have entered an order that this counsel [Detricks'] shall continue and all." The district court, however, did not substitute the bankruptcy Trustees as plaintiffs. In addition, Panalpina argues that the Trustees may not be substituted as Appellants in the instant case because the Trustees were not substituted as plaintiffs before the district court, and the district court's entry of summary judgment was directed against Guy and Donna Detrick, and Fast Forward, Inc.

While no doubt exists that the bankruptcy Trustees did not file a motion to substitute as plaintiffs before the district court, by virtue of the Detricks' bankruptcy, the Trustees succeeded to the Detricks' RICO and conspiracy claims, and the Trustees' retention of the Detricks' counsel sufficiently evinced the Trustees' exercise of their discretion to allow the Detricks to pursue the present cause of action on behalf of the estate. As such, the judgment entered against the Detricks by the district court was a judgment entered on behalf of the Detricks' estate, not on behalf of the Detricks in their individual capacity. Accordingly, the Trustees may pursue the appeal of the district court's decision. Hence, we conclude that the motion to substitute the Trustees as appellants in the instant action should be granted.

B.

Turning to the merits of the appeal, the court reviews the district court's grant of summary judgment *de novo*, regarding the evidence in the same plenary manner and applying the same standard the district court applied. *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993). Under this standard, all facts and inferences to be drawn from those facts must be viewed "in a light most favorable" to the nonmoving party. *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). A mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment, rather the nonmoving party must demonstrate that there exists a genuine issue of material fact to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

1. RICO Claim

The RICO statute does not contain an express statute of limitations period for actions arising from either its civil or criminal enforcement provisions. In *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156-57 (1987), however, the United States Supreme Court held that claims arising under civil RICO shall be governed by a four-year statute of limitations.[11] Unfortunately for the courts of appeals and district courts throughout the country, the Supreme Court declined to decide when a claim under RICO accrues, "[b]ecause it is clear that [the Appellee's] RICO claims

[11] "Despite RICO's failure to provide a statute of limitations for criminal violations, the general five-year "catchall" federal criminal statute of limitations applies to "criminal RICO prosecutions only because Congress has provided such a criminal limitations period when no other period is specified." *Agency Holding*, 483 U.S at 154.

accrued within four years of the time the complaint was filed." *Agency Holding*, 483 U.S. at 156-57.[12]

The Supreme Court's lack of guidance on the accrual issue has generated a split amongst the federal courts of appeals and district courts.[13] The Fourth Circuit in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), has adopted a theory of accrual known as the "injury discovery" rule. The injury discovery rule provides that a RICO claim accrues and the statute of limitations begins to run "when a plaintiff knows or should know of the

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[12] While the Supreme Court did grant certiorari in *Grimmett v. Brown*, 75 F.3d 506 (9th Cir.), *cert. granted*, 116 S.Ct. 2521 (1996), presumably to address the accrual issue, recently the petition was dismissed as improvidently granted, *cert. dismissed*, __ S.Ct. __, 1997 WL 9860 (U.S. Jan. 14, 1997) (No. 95-1723).

[13] The United States Courts of Appeals for the First, Second, Fifth, Seventh and Ninth Circuits follow the injury discovery rule of accrual. *See, e.g., McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992); *Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); and *Beneficial Std. Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988); *La Porte Constr. Co., Inc. v. Bayshore Nat'l Bank of La Porte*, 805 F.2d 1254, 1256 (5th Cir. 1986). In contrast, the United States Courts of Appeals for the Eighth, Tenth, and Eleventh Circuits hold that a RICO claim accrues when the plaintiff discovers or should have discovered *both* his injury and the defendant's pattern of racketeering activity. *See, e.g., Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaines, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *rev. on other grounds, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354 n.1 (1991); and *Bivens Gardens v. Barnen Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). The Sixth Circuit in *Agristor Financial Corp. v. Van Sickle*, 967 F.2d 233 (6th Cir. 1992) acknowledged the injury discovery rule and the injury and pattern discovery rule, but concluded that under either rule plaintiff's RICO claim was time barred. The Third Circuit follows the last predicate act rule wherein the statute of limitations period restarts when the plaintiff knew or should have known of the last predicate act which is part of the same pattern of racketeering activity. *See Glessner v. Kenny*, 952 F2d 702, 706 (3d Cir. 1991).

injury that underlies his cause of action." *Id.* at 220; *see also Bausch v. Philatelic Leasing, Ltd.*, 728 F.Supp. 1201, 1206 (D.Md. 1989), *aff'd*, 34 F.3d 1066 (4th Cir. 1994) (Table).

At the core of the instant controversy is the circuit's decision in *Pocahontas*. While purportedly not challenging the propriety of the "injury discovery" rule, the Trustees contend that the district court failed properly to apply the rule to the facts of the instant case. Specifically, the Trustees maintain that at the time of their abandonment of the warehouse contract in 1990, when the Detricks sustained an economic loss, the Detricks had no reason to know, and could not have possibly known that they had incurred any "injury that underlies their cause of action" within the meaning of civil RICO, 18 U.S.C. § 1964(c). The Trustees argue that the mere occurrence of economic loss does not trigger the statute of limitations, under the injury discovery rule adopted by the circuit in *Pocahontas*. Rather, the Trustees maintain that the plaintiff must have had knowledge, either actual or constructive, that such "injury" is related to or arises from at least one predicate act giving rise to a RICO violation.

In *Pocahontas*, the plaintiff, a contract coal mining company and its sole stockholder, asserted antitrust and conspiracy claims under § 8 of the Clayton Act, 15 U.S.C. § 19, §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, § 1964 of RICO, 18 U.S.C. § 1964, and under state law. Each of these claims was based, *inter alia*, on allegedly illegal interlocking directorates between and among the defendants. The plaintiff alleged that the termination of its contract mining agreement on May 1, 1979 by the defendants, was part of a general conspiracy among the defendants to eliminate certain contract miners in order to monopolize the relevant coal market. When the plaintiff's contract was terminated on May 1, 1979, the plaintiff had no knowledge whatsoever of the corporate relationships and interlocking directorates upon which its RICO claim was based. Nor was the plaintiff aware that the termination of its contract was related to the defendants' conspiracy to violate the antitrust laws. The plaintiff was only aware

that its contract had been terminated, and in turn, the plaintiff had suffered an economic loss therefrom. *Pocahontas,* 828 F.2d at 214.

Subsequently, from time to time, plaintiff inquired of the defendants about the low prices the defendants were paying for coal, to which the defendants responded that the low prices were a result of poor market conditions. Only after searching through public records,[14] in early 1984, did the plaintiff learn of the interrelationships between the various defendants. In December, 1984, plaintiff filed suit. *Id.* at 215.

In affirming the dismissal of plaintiff's claim, the *Pocahontas* court held that plaintiff's RICO claim arose when plaintiff knew or should have known of the injury underlying its RICO cause of action. *Id.* at 220. The court also rejected as to both the RICO and antitrust claims, plaintiff's claim of fraudulent concealment. Thus, the court held that plaintiff's RICO claims were barred by the four-year statute of limitations.

The Trustees urge that the "injury discovery" rule adopted by the circuit in *Pocahontas* is a "knowledge-based rule" as "[i]t is not mere economic loss which marks the accrual of a RICO cause of action, but [the Detricks'] knowledge of facts and circumstances sufficient to put the plaintiff on inquiry notice and demonstrate some reasonable correlation between the loss and the RICO cause of action—only this connection signifies 'injury that underlies the cause of action.' " Trustees' Brief, at 18.

For support for their position, the Trustees tellingly rely on cases from other circuits. The Trustees argue that the application of the injury discovery rule by the Ninth Circuit in *Beneficial Standard Life Ins. Co. v. Madariaga,* 851 F.2d 271 (9th Cir. 1988), is fully consistent with the "knowledge based rule." In deciding whether to apply the accrual rule as announced in *Compton v. Ide,* 732 F.2d 1429, 1433 (9th Cir.

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[14] These records included land title documents and mining applications at the West Virginia and Kentucky state mine agencies, and the defendants' annual reports.

1984), or the accrual rule used in antitrust cases, the Ninth Circuit chose to apply the knowledge-based *Compton* rule to the plaintiff's claims. Under the *Compton* "knowledge-based rule", plaintiff's suit would be barred if the plaintiff "knew or should have known about its *claims* within the four-year RICO statute of limitations period." *Beneficial,* 851 F.2d at 275 (emphasis added).[15] Further, the court stated that "the statute of limitations period accrued when [the plaintiff] had actual or constructive knowledge of *the fraud . . .*" *Id.* (emphasis added).

In our view, the Ninth Circuit's application of the injury discovery rule requires the plaintiff's knowledge, either actual or constructive, of the underlying fraud, in addition to the injury for which the plaintiff is seeking compensation. Throughout the Ninth Circuit's discussion of the accrual time of RICO claims, the court refers to the plaintiff's knowledge of its claims, or the underlying fraud. Since, the court was aware that under the antitrust accrual rule, the statute of limitations is triggered by the date of the injury alone, the Ninth Circuit's injury discovery rule is more akin to the circuits that require that the plaintiff know both of his injury and the pattern of racketeering which serve as a basis for his RICO action.

The Trustees also rely upon an unpublished district court decision from New York, *Dayton Monetary Assocs. v. Donaldson, Lufkin & Jenrette Securities Corp.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,026 (S.D.N.Y. Aug. 11, 1992).[16] In that case, plaintiffs asserted RICO claims arising out of their investments in limited partnerships in which plaintiffs' tax losses were disallowed because of fraudulent misconduct on the part of various agents of the partnerships. In moving to dismiss plaintiffs' claims on the basis of the

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[15] The *Beneficial* court noted, however, that in antitrust actions "the plaintiff's knowledge is generally irrelevant to accrual, which is determined according to the date on which the injury occurs." *Id.* at 275.

[16] 1992 WL 204374 (S.D.N.Y. Aug. 11, 1992).

statute of limitations, the defendants argued that because of prior dissemination of adverse public disclosure regarding problems with investments, plaintiffs knew or should have known of the alleged fraud before March 25, 1987. In contrast, the plaintiffs urged that their RICO claims did not accrue until October 27, 1987, when some of the plaintiffs learned of the existence of secret agreements between and among the defendants relating to the alleged fraud, or until December, 1987, when certain of the individual defendants were convicted of tax fraud.

Applying the "injury discovery" rule the district court held that plaintiffs' RICO claims accrued as a matter of law on "March 25, 1987, when [the defendant's] indictment became public," which was the earliest date on which the plaintiffs knew or should have known of "the fraudulent scheme which is the basis for the claims here."[17] *Id.* at 94,523. The court emphasized that at the time the plaintiffs had suffered their investment losses, they had no knowledge of defendants' fraudulent scheme. The district court stated:

> Here, although plaintiffs knew by 1985 that they had suffered losses in their investments in Groups, they cannot be charged as a matter of law with knowledge then that the losses were actually 'racketeering injuries' (caused by defendants' racketeering acts) within the meaning of *Bankers Trust.*[18]

Id. at 94,522. The *Dayton* court stated 'plaintiffs first learned of defendants' racketeering acts and later discovered that they

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[17] The district court rejected the defendants' arguments that dissemination of adverse public information regarding the limited partnerships in which plaintiffs invested their money, and the IRS deficiency notices constituted sufficient inquiry notice to plaintiffs of their injury.

[18] In *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), the Second Circuit adopted a rule of separate accrual which provides that "each time a plaintiff discovers or should have discovered an injury caused by defendant's [RICO] violation, a new cause of action arises as to that injury, regardless of when the actual violation occurred." *Id.* at 1102.

were injured by those acts . . . immediately after plaintiffs learned of their RICO injury, they had all the information necessary to bring RICO actions, because they already knew of defendants' racketeering acts." *Id.* at 94,522.[19]

Thus, following the *Beneficial* and *Dayton* courts' application of the knowledge-based injury discovery rule, the Trustees argue that the district court should be reversed because until March 11, 1991, when the former Fast Forward employee showed Guy Detrick the false shipping invoice, the Detricks had no knowledge whatsoever of the alleged fraudulent activities which formed the basis for the Trustees' RICO claims. Trustees' Brief, at 22.

The Trustees' argument is problematic for a number of reasons, not the least of which is the Trustees' reliance on non-binding authority. Despite the fact that the Trustees maintain that they are not challenging the propriety of the injury discovery rule, the Trustees are doing precisely just that. Seemingly, the Ninth Circuit has read the term injury to require that the plaintiff know or have constructive knowledge of the racketeering activity which forms the basis for the RICO claim. The *Dayton* court also applied the injury discovery rule in a like manner. In that case, the district court held, apparently in contravention of *Bankers Trust,* that the plaintiff must have knowledge of the injury, as well as, the defendants' racketeering acts, before the RICO cause of action begins to accrue, and the statute of limitations begins running. Both the *Beneficial* and *Dayton* courts speak in terms

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[19] In their reply brief, the Trustees rely on *Bontkowski v. First Nat'l Bank,* 998 F.2d 459 (7th Cir.), *cert. denied* 510 U.S. 1012 (1993), for support of its knowledge-based rule. In that case, the Seventh Circuit reiterated its injury discovery rule, and held that the plaintiff's claim was time-barred. In *Bontkowski,* the plaintiff argued that he was unaware that the defendant had committed wire fraud on him until 1988, and hence, his lawsuit filed in 1991 was timely. The court of appeals disagreed concluding that at the earliest the plaintiff should have been aware of his injury in 1982, when the defendant called his loan in, or at the latest, in 1984 when the plaintiff and others were indicted. Thus, the court concluded that the plaintiffs RICO claims were time-barred.

of the plaintiff's claim, not injury, and as such have interpreted the term "injury" for RICO purposes to encompass the actual injury and the cause of action.

In *Pocahontas,* the circuit stated that "the statutory period begins to run when a plaintiff knows or should know of the *injury* that underlies his cause of action." *Pocahontas,* 828 F.2d at 220. Tellingly, the court's holding recognizes the distinction between the injury and the cause of action. The *Pocahontas* plaintiff urged that it did not discover until early 1984, the interrelationships amongst the defendants that formed the bases for the RICO claims. Nevertheless, the court concluded that the plaintiff's "injury" occurred in May 1979, when plaintiff's contract was terminated, and since the suit was filed in December 1984, the suit was time-barred.

Nothing in the *Pocahontas* case suggests that the circuit intended the "injury" to refer to both the actual injury as well as the plaintiff's discovery of the defendant's racketeering acts.[20] The Trustees' attempt to distinguish *Pocahontas* on the grounds that the information in *Pocahontas* was publicly available, and thus, the plaintiffs knew or should have known that they had suffered an injury arising out of and connected

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[20] Other courts which apply the injury discovery rule do not require knowledge of the underlying cause of action before the statute of limitations begins to accrue. In fact, in *McCool v. Strata Oil Company,* 972 F.2d 1452 (7th Cir. 1991), the Seventh Circuit expressly rejected the accrual rule adopted in other circuits which require both knowledge of the injury and the cause of action before the statute of limitations begins to run on RICO claims. *McCool* held that "a RICO claim accrues when the plaintiff discovers her injury, *even if she has not yet discovered the pattern of racketeering." Id.* at 1464 (emphasis added). Moreover, the court recognized that "an important distinction" exists "between discovery of an injury and discovery of a cause of action." *Id.; see also United States v. Kubrick,* 444 U.S. 111, 123 (1979) (action under Federal Tort Claims Act "accrues" on discovery of injury, not on discovery of negligence).

Similarly, the First Circuit, in *Rodriguez v. Banco Central, et al.,* 917 F.2d 664 (1st Cir. 1990), relying on the *Bankers Trust* case, held that a RICO cause of action begins to accrue "at the time a plaintiff knew or should have known of his injury." *Id.* at 665.

to misconduct, Trustees' Brief, at 18 n.11, is equally unavailing. Other than during the recitation of the facts, and in the court's discussion of the fraudulent concealment claim, the court did not mention that the public nature of the information played any role in determining when the statute of limitations began to run.[21]

Furthermore, the adoption of the Trustees' proposed rule would be directly contrary *to Pocahontas*.[22] The Detricks' injury occurred in April, 1990, when the Detricks abandoned their warehouse contract with Panalpina. The Detricks discovered the alleged fraud on March 11, 1991. Thereafter, the Detricks filed the instant suit on March 9, 1995. A straightforward application of the rule adopted in *Pocahontas* provides that the four-year statute of limitations began to run in

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[21] In addition, the circuit's decision, in *Bausch v. Philatelic Leasing, Ltd*, 728 F.Supp. 1201, 1206, *affd*, 34 F.3d 1066 (4th Cir. 1994), reiterated the injury discovery rule developed in *Pocahontas*. In that case, the United States, in June 1983, filed suit against the defendants alleging that the stamp master scheme which defendants sold to the plaintiffs was an abusive tax shelter. Plaintiffs did not dispute that they were told about the existence of the lawsuit. As a result, the plaintiffs asked the defendant who had sold them the scheme, and based on his assurances that they had nothing to worry about, did nothing. Similarly, plaintiffs, again, accepted the defendant's assurances when the IRS sent them deficiency and penalty notices.

The district court found that the fraudulent concealment doctrine was unavailable to the plaintiffs because of the inadequacy of the plaintiffs' investigation once placed on notice of the IRS lawsuit, and their receipt of the IRS notices. Thus, the district court held, and the Fourth Circuit affirmed, that the plaintiffs' RICO claims accrued as of June 1983, the filing date of the IRS challenge. Therefore, the plaintiffs' lawsuit, filed in 1988, was time-barred.

[22] While not addressed in *Pocahontas*, the policy reasons underlying the adoption of a discovery rule predicated on the discovery of the injury, and not also the cause of action, stems from the courts' recognition that statutes of limitations serve to prevent the litigation of stale claims. *See, e.g. Gould v. U.S. Dept. of Health & Human Services, 905* F.2d 738, 741 (4th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991) ("right to be free in time comes to prevail over the right to prosecute them").

April 1990, the date of the injury. Hence, the district court correctly concluded that the Trustees' claims, filed in 1995, were time-barred.

2. Fraudulent Concealment

As a fallback argument, the Trustees argue that even if the injury occurred in April, 1990, and hence, the statute of limitations would bar any claims after April, 1994, the statute of limitations should be tolled until March 11, 1991, the date of Guy Detrick's discovery, based upon the equitable doctrine of fraudulent concealment.

The purpose of the fraudulent concealment doctrine is "to prevent a defendant from 'concealing a fraud, or . . . committing a fraud in a manner that it concealed itself until' the defendant 'could plead the statute of limitations to protect it.' " *Supermarket of Marlinton v. Meadow Gold Dairies,* 71 F.3d 119, 122 (4th Cir. 1995) (Marlinton). Furthermore, "when the fraud has been concealed or is of such a character as to conceal itself, and the plaintiff is *not negligent or guilty of laches,* the limitations period does not begin to run until the plaintiff discovers the fraud." *Id.* at 122. A party seeking to invoke the doctrine of fraudulent concealment must demonstrate that "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence."[23] *Id.*

Initially, we must address by what standard do the Trustees have to demonstrate the existence of the first prong. In *Marlinton,* a price-fixing case, the Fourth Circuit addressed the differing standards for determining whether antitrust plaintiffs have satisfied the first element of the fraudulent concealment

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[23] The Supreme Court has stated that the fraudulent concealment doctrine is to be "read into every federal statute of limitation." *Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946).

doctrine. After weighing the pros and cons of the "self concealing"[24] standard, the "separate and apart"[25] standard, and the intermediate "affirmative acts" standard, the court ultimately held that the intermediate affirmative acts standard should be applied because "price-fixing is not inevitably deceptive or concealing", *Marlinton,* 71 F.3d at 123, and the intermediate affirmative acts standard "would permit the courts to avoid the difficult, if not impossible, task of deciding which acts are in furtherance of conspiracies and which acts are separate and apart from conspiracies." *Id.* at 125.

Thus, the court held that to satisfy the first element of the fraudulent concealment doctrine, the plaintiff must "provide evidence of affirmative acts of concealment by [the defendant]. Those acts, however, need not be separate and apart from the acts of concealment involved in the antitrust violation; rather, [the plaintiff's] proof may include acts of concealment involved in the alleged antitrust violations itself." *Id.* at 126.[26]

The issue the Trustees raise is not novel, in fact, the *Pocahontas* court addressed the precise issue. In that case, the plaintiffs sought to avoid the bar of the statute of limitations, on their antitrust and RICO claims, by similarly drawing on

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[24] The self-concealing standard is only proper when deception or concealment is a necessary element of the antitrust violation. *Id.* at 123. Under the self-concealing standard, the plaintiff satisfies the first element of the fraudulent concealment doctrine by "merely proving that a self-concealing antitrust violation has occurred." *Id.* at 122.

[25] Under the separate and apart standard, the plaintiff is required to provide evidence, separate and apart from the acts of concealment involved in the antitrust violation, that the defendants affirmatively acted to conceal the plaintiff's claim. *Id.* at 122.

[26] Other circuits have also held that affirmative acts in furtherance of the conspiracy provide sufficient evidence of fraudulent concealment to establish the first element of the fraudulent concealment test. *See Conmar Corp. v. Mitsui & Co.,* 858 F.2d 499, 505 (9th Cir. 1988), *cert. denied* 488 U.S. 1010 (1989); *Pinney Dock & Transport Co. v. Penn Central Corp.,* 838 F.2d 1445, 1472-74 (6th Cir.), *cert. denied,* 488 U.S. 880 (1988).

the doctrine of fraudulent concealment. Plaintiffs claimed that (1) the existence of the interrelationships among the defendant companies, and (2) the defendants' specific activities undertaken pursuant to the conspiracy, such as boycotts, suspensions, systematic terminations of contract miners, delivery quotas, and related manipulative and deceptive practices, were concealed from the plaintiffs, and hence, the statute of limitations should be tolled by the fraudulent concealment doctrine. The district court disagreed.

In affirming the district court, the Fourth Circuit noted that the district court "[p]roperly [took] into account the indisputable fact that any structural interrelationship between the corporate defendants was necessarily discoverable upon simple inquiry and consultation of public records . . . ." *Pocahontas,* 828 F.2d at 218. Furthermore, the court rejected, as the district court had, the plaintiffs' averments that the defendants employed techniques of secrecy to avoid detection of the combination and conspiracy. The court noted that the plaintiffs' general inquiry as to why the defendants were able to accept deliveries of coal at such a low price, and the defendants' false answer that market conditions dictated the low price, was insufficient to establish the fraudulent concealment. The court stated that

> [t]o permit a claim of fraudulent concealment to rest on no more than an alleged failure to own up to illegal conduct upon this sort of timid inquiry would effectively nullify the statute of limitations in these cases. It can hardly be imagined that illegal activities would ever be so gratuitously revealed.

Id. at 218-19.[27]

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[27] While the court's discussion of the fraudulent concealment claims was addressing the plaintiff's Sherman Act claims, the court later held that the plaintiff's fraudulent concealment claim within the RICO context was "as unavailing here as it was for the Sherman Act claims, for the same reasons discussed in connection with those claims." *Pocahontas,* 828 F.2d at 220.

As the *Marlinton* court noted, the *Pocahontas* court did not employ any of the standards outlined in *Marlinton,* which of course, is not surprising given that neither party argued for the adoption of any standard, and the case law had not been developed on that issue in the Fourth Circuit. *Marlinton,* 71 F.3d at 124. Hence, while the instant case does not involve antitrust violations the intermediate affirmative acts standard adopted in *Marlinton* would apply in the instant case. As in the price-fixing case involved in *Marlinton,* the alleged unlawful rebilling scheme does not require secrecy as an element of their RICO claims. Thus, for the Trustees to prevail, they must come forward with evidence, that as part of the alleged rebilling scheme, Panalpina, Multi-Modal, and Friedman committed affirmative acts which concealed their conduct from the Detricks.

Here, the Trustees argue that the defendants' activities of (a) the creation of dummy corporations which had no employees and conducted no business, (b) the use of false addresses to obtain carrier authorizations from the Interstate Commerce Commission, (c) the fraudulent re-billing through false freight bills for non-existent freight brokerage activity, (d) the fraudulent inflation of invoices in connection with truck brokerage activity, (e) the payment of substantial bribes to officers and employees of Panalpina, and (f) the deposit of checks received from those criminal activities in numerous bank accounts which were opened in order to insulate these criminal activities from discovery all demonstrate Panalpina, Multi-Modal, and Friedman's fraudulent concealment of its rebilling scheme from the Detricks.

Moreover, the Trustees argue that the instant case involved no public filings, no press releases, or any other public information from which the Detricks could have discovered the alleged illegal activities of Panalpina, Multi-Modal, and Friedman. Thus, the Trustees maintain that no information, whatsoever, was available to them to place them on inquiry notice or require them to proceed with a reasonable and dili-

gent investigation into the alleged fraudulent conduct, until at the earliest March 11, 1991.

The district court concluded that the Trustees' evidence was lacking. The district court noted that Multi-Modal hired the Trustees and provided them with access to the warehouse, and ostensibly, to the fraudulent invoices. The district court rejected the Trustees' fraudulent concealment claim concluding that the Trustees "presented no evidence of any acts of fraudulent concealment, but rather present[ed] evidence that Panalpina hired and put the [Detricks] in the very warehouse where they would have access to the records they claim were needed to discover the fraud." Order, at 2.

In order for the Trustees to succeed on a fraudulent concealment claim, they must demonstrate that Panalpina, Multi-Modal, and Friedman engaged in some affirmative acts from April, 1990 to March 11, 1991, to conceal the alleged fraud. The district court concluded that the Trustees failed to demonstrate any such affirmative acts. We agree.

3. Virginia Conspiracy Claim

The Trustees also sought relief under the Virginia conspiracy statute, Va. Code Ann. § 18.2-500 (Michie 1995) for their injuries. The Trustees claim the district court erred in concluding that their claims were barred by the statute of limitations.

The statute of limitations applicable to the conspiracy claim is five years. Va. Code Ann. § 8.01-243 (Michie 1995). A cause of action under the conspiracy statute accrues at the time the Detricks first suffered any damages resulting from the acts committed in furtherance of the conspiracy. *Eshbaugh v. Amoco Oil Co.*, 360 S.E.2d 350 (Va. 1987). As the Virginia Supreme Court stated in *Stone v. Ethan Allan, Inc.*, 350 S.E.2d 629 (Va. 1986)

> where an injury, though slight, is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy therefor, the statute of limita-

> tions attaches at once. It is not material that all the damages resulting from the act should have been sustained at the time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.

Id. at 632; *see also International Surplus Lines Ins. Co. v. Marsh & McLennan, Inc.*, 838 F.2d 124, 129 (4th Cir. 1988) ("In Virginia, only the slightest injury is required to start the running of the limitations period . . . It is of no consequence that the amount of damages [is] not ascertainable until a later date.")

Again, the dispute between the parties centers on when the statute of limitations began to run. The Trustees maintain that the conspiracy claim accrued, at the earliest, in April 1990, when the Detricks abandoned the warehouse contract. Panalpina, Multi-Modal, and Friedman argue, and the district court found, that the Detricks were injured by Panalpina's "insistence that they lower rates and increase staffing levels . . . in early 1989 at the latest." Order, at 3.

The gravamen of the Trustees' argument is that since the object of the alleged conspiracy was to force the Detricks to abandon their warehouse contract, and because termination of that contract is the injury for which the Trustees seek compensation, the statute of limitations did not commence until April 1990, when the Detricks abandoned their contract.[28]

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[28] The Trustees also argue that genuine issues of material facts exist with respect to "which of the [Panalpina, Multi-Modal and Friedman's] acts harmed them, when they occurred. and what injury resulted." Trustees' Brief, at 30. The Trustees' argument is not persuasive. While true that the Detricks abandoned the warehouse contract in April 1990, the Trustees' argument attempts to ignore the fact that the Detricks' abandonment of the contract resulted from a culmination of the alleged conspiracy to force such abandonment. Since the contract was abandoned in 1990, the events leading up to that termination obviously had to occur before that date, and as such, the statute of limitations could not have begun to run in April 1990. Thus, the district court correctly concluded that no genuine issues of material fact existed with respect to the Trustees' position.

Moreover, the district court also properly concluded that the Trustees' argument flies in the face of well-established Virginia law as to when the statute of limitations begins to run. The Trustees do not challenge that in late 1988, and in early 1989, Panalpina demanded that the Detricks lower their rates and increase staffing at the warehouse. Hence, the Detricks' initial injury, albeit slight, occurred in early 1989 at the latest, and culminated in April 1990. Virginia law is clear that the statute of limitations begins to run, when any injury occurs, and thus, the district court properly concluded that the statute of limitations began to run in 1989, and consequently, the Trustees' lawsuit filed in March, 1995 was time barred by the five-year statute of limitations.[29]

III.

On its cross-appeal, Panalpina argues that the district court erred in dismissing Panalpina's breach of contract and Virginia conspiracy statute counterclaims. Finding no error, we affirm. We now address each of Panalpina's counterclaims.

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[29] The Trustees also argue that the district court's finding that for purposes of the RICO statute, the Detricks' injury occurred in April 1990, and for purposes of the Virginia conspiracy claim, the Detricks were injured in 1989 at the latest, is inherently inconsistent. The Trustees' argument fails to take into consideration the different statute of limitations; RICO's four-year and Virginia's five-year. As such, the district court for RICO purposes did not need to decide whether the Detricks' earlier 1989 injuries triggered the statute of limitations, because the Detricks' April 1990 injury was well before the four year statute of limitations. The same analysis, however, would not apply for the five year statute of limitations with respect to the conspiracy claim, and as such, the district court needed to address the Detricks' earlier injuries to determine the timeliness of the Trustees' claim. Rather than demonstrating an inconsistency, the district court's order reflects the court's correct application of different statutes of limitations periods.

A. BREACH OF CONTRACT CLAIM

To establish a cause of action for breach of contract, Panalpina must demonstrate that (1) the Detricks had a legal obligation to Panalpina; (2) the Detricks violated that right or duty; and (3) Panalpina was injured as a result of the breach. *Westminster Investing Corp. v. Lamps Unlimited, Inc.*, 379 S.E.2d 316, 318 (Va 1989).

Panalpina argues that the invoices submitted by Panalpina provide ample support for Panalpina's breach of contract claim. Panalpina contends that the invoices provide substantial evidence that the Detricks sought double or triple reimbursement for invoices Panalpina had already paid. In contrast, the Detricks argue that none of the materials submitted by Panalpina satisfied the admissibility requirements of Fed. R. Civ. P. 56(e) because each of Panalpina's employees and officers refused to testify about the invoices, instead each officer and employee invoked their Fifth Amendment privileges. Thus, the Detricks argue that these documents unaccompanied by any testimony or other admissible evidence necessary to demonstrate their authenticity or an exception to the hearsay rule should be rejected. Moreover, the Detricks submitted the affidavit of Donna Detrick flatly denying that the Detricks had overbilled Panalpina for any charges.

The district court, in our view, properly concluded that Panalpina had presented no evidence from which a reasonable jury could find a breach of contract. District Court Order, October 27, 1995, at 1. Panalpina's invoices, standing alone, fail to demonstrate that any overbilling has occurred, and hence, the district court's decision is affirmed.

B. CONSPIRACY CLAIM

In addition, the district court concluded that Panalpina's conspiracy claim was barred by the intracorporate immunity doctrine. The intracorporate immunity doctrine provides that a conspiracy can not exist between the agents of a corporation

and the corporation itself. *Griffith v. Electrolux Corp.*, 454 F.Supp. 29, 32 (E.D. Va. 1978). A well-established exception, however, exists to the doctrine, namely, when the parties have "an independent personal stake" in the conspiracy. *Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974).

Panalpina argues that the exception to the doctrine applies in the instant case because the Detricks signed the warehouse contract in their individual capacity.[30] Moreover, Panalpina contends that the Detricks have sued in their individual capacities, and not on behalf of Fast Forward. Thus, Panalpina argues that the Detricks "had an 'independent personal stake' in the conspiracy which is separate and apart from Fast Forward's interest." Appellees' Brief, at 36.

The district court concluded that Panalpina had merely alleged a "conspiracy among the corporation and officers of that corporation and a corporation cannot conspire with itself." Order, at 2. We concur.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[30] The Detricks note that a review of the warehouse contract demonstrates that the Detricks signed in their capacity as owners of the corporation, and that the corporation itself was designated as the contractor.

No. 96-1820

Supreme Court, U.S.
FILED
JUN 19 1997
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

H. JASON GOLD, in His Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in His Capacity as Chapter 7 Trustee for Donna Detrick and FAST FORWARD, INC.,

Petitioners,

vs.

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA and SYLVAN FRIEDMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PANALPINA, INC. AND PANALPINA AIRFREIGHT, INC.

EDWARD D. GREENBERG
Counsel of Record
DAVID K. MONROE
HELLE R. WEEKE
GALLAND, KHARASCH
& GARFINKLE, P.C.
Attorneys for Respondents Panalpina, Inc. and Panalpina Airfreight, Inc.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-5200

71369 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

30 pp

QUESTION PRESENTED

1. May a party maintain a RICO claim filed more than four years after discovery of both the existence of his injury and the identity of the putative defendant?

RULE 29.6 LISTING

Panalpina, Inc.:

Panalpina, Inc.'s parent company is Panalpina World Transport Ltd., a Swiss corporation.

Panalpina, Inc. has no non-wholly owned subsidiaries.

Panalpina Air Freight, Inc.:

Panalpina Air Freight, Inc. no longer is in existence.

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Respondents Panalpina, Inc. and Panalpina Airfreight, Inc.[1] respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Fourth Circuit in this case.

STATEMENT OF THE CASE

A. Introduction

Petitioners[2] were contractors who operated Panalpina's warehouse pursuant to an at-will contract. Petitioners allege that sometime in 1989, Panalpina decided to engage in certain illegal billing practices, and as a result, determined it was necessary to remove petitioners from its warehouse. Petitioners contend that rather than simply exercising its right to terminate the warehouse contract on sixty days notice, Panalpina instead imposed a series of price cuts and other economic hardships over 15 months in order to force petitioners to leave. Petitioners did, in fact, abandon the warehouse contract in April 1990. Eleven months later, petitioners learned of the so-called illegal rebilling scheme, and immediately concluded that their economic troubles had been caused in some way by the rebilling activity.

Petitioners sought legal counsel, and determined that they had claims against Panalpina. Nonetheless, petitioners waited an additional four years — almost five years after they have been injured — to commence this action. Because petitioners delayed bringing their RICO claims until after the limitations period had passed, the District Court granted summary judgment

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1. These respondents are hereinafter collectively referred to as "Panalpina."

2. The term "petitioners" means the named petitioners herein and the named plaintiffs and appellants, Guy Detrick and Donna Detrick, in, respectively, the District Court and the Court of Appeals.

in favor of Panalpina. *Detrick v. Panalpina, Inc.*, No. 96-306-A (E.D. Va. filed Oct. 26, 1995). The Fourth Circuit affirmed. *Detrick v. Panalpina, Inc.*, 108 F.3d 529 (4th Cir. 1997).

Petitioners now seek to avoid the consequences of their own purposeful delay by urging upon this Court the application of a new accrual rule they have never raised below.

B. Course of Proceedings and Disposition of the Case Below

On March 9, 1995, petitioners filed a complaint alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, ("RICO"), as well as a state law conspiracy claim under Virginia law. On May 19, 1995, petitioners filed a verified First Amended complaint. Petitioners alleged that respondents conspired to force petitioners to abandon their at-will warehouse contract with Panalpina in order to begin a fraudulent billing scheme directed at certain foreign governments.

Respondents moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that the RICO and associated state law claims were barred by the statute of limitations. In opposition to the motion to dismiss, petitioners raised for the first time the defense of fraudulent concealment. The District Court denied the motion to dismiss in order to afford petitioners the opportunity to conduct discovery regarding fraudulent concealment.

At the close of discovery, respondents filed a motion for summary judgment on the grounds that petitioners' claims were barred by the statute of limitations. In addition, respondents argued that petitioners did not have standing to assert claims under RICO because there was no evidence that petitioners had been injured by any racketeering activity or by the investment

of the proceeds of a RICO scheme. The District Court determined that the statute of limitations on petitioners' RICO claims began to run no later than April 1990, when petitioners were allegedly forced to terminate their contract. Accordingly, the District Court held that the four-year RICO statute of limitations expired no later than April 1994, almost a year before petitioners commenced this action. The District Court also found that petitioners had come forward with no evidence to support their allegations of fraudulent concealment, and dismissed the amended complaint as time barred. Based upon its ruling on the limitations issue, the District Court did not find it necessary to address respondents' standing argument.

Petitioners appealed to the Court of Appeals for the Fourth Circuit. On appeal, petitioners argued that under the "injury discovery" accrual rule, petitioners' RICO claims did not accrue until they had knowledge of both their injury and the fact that their injury was related to racketeering activity. Petitioners did not raise, argue, or even cite the accrual rule set forth in *United States v. Kubrick*, 444 U.S. 111 (1979), upon which they now seek to rely. The Court of Appeals found that petitioners' claim accrued at the latest in April 1990, when they were allegedly forced to abandon their warehouse contract, and thus held petitioners' RICO claims were time barred. In addition, the Court of Appeals affirmed the District Court's finding that petitioners had failed to present any evidence establishing fraudulent concealment.

Petitioners did not seek rehearing before the Court of Appeals, instead filing the instant Petition for a Writ of Certiorari with this Court.

C. Statement of Facts Pertaining to the Issues Raised by the Petition

Panalpina is an international freight forwarder in the

business of arranging for the worldwide transportation goods on behalf of its customers. (App. 26, 157).[3] Panalpina operated a warehouse facility in Sterling, Virginia. (App. 26). During the time period at issue, much of Panalpina's business at the Sterling warehouse related to the transportation of military equipment purchased from the United States by various foreign governments under what is known as the Foreign Military Sales Program ("FMSP"). Panalpina provided such transportation services to the government of Turkey pursuant to a contract executed in November 1988. (App. 665).

On October 24, 1988, Panalpina executed a contract with Northeast Container Corporation ("Northeast"), pursuant to which Northeast agreed to provide warehouse services at the Sterling warehouse. (App. 309).[4] The warehouse services Northeast committed to provide included unloading freight from trucks, logging the freight in, storing the freight in the warehouse, and packing it for overseas shipment. (App. 362-364). The warehouse contract was terminable at-will by either party on 60 days notice. (App. 311, 360-61).

The contract specified that Northeast would be paid 3.5 cents per pound for handling large freight. (App. 312). According to Guy Detrick, however, Northeast and Panalpina had previously agreed to a rate of 4.5 cents per pound for large freight, but Panalpina unilaterally lowered the rate during the negotiations leading to the warehouse contract. (App. 377-78). Mr. Detrick further testified that Panalpina justified that decrease by claiming that Sylvan Friedman ("Friedman"), and his companies, Multi-Modal Freight Systems, Inc. and Multi-Modal

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3. References to the joint appendix lodged with the Court of Appeals are designated "App. __.".

4. Northeast Container was a company partially owned and operated by the Detricks.

Freight Systems of Virginia (collectively "Multi-Modal"), would do the work for only a penny a pound. (App. 378).

In early 1989, Northeast began to process the Turkish/ FMSP freight moving through the Sterling warehouse. Because the volume of this freight was very large, Panalpina requested that the rate for handling large Turkish freight be lowered from 3.5 cents per pound to 2.5 cents per pound. (App. 595-600). Although Mr. Detrick was unsure whether Panalpina had a contractual right to reduce the rate for Turkish freight, and complained about the reduction, he ultimately agreed to it. (App. 595-600). On June 7, 1989, Panalpina again requested a reduction in the rate for handling Turkish freight, this time from 2.5 cents per pound to two cents per pound. (App. 600, 795). Panalpina indicated that the reduction was necessitated by a budget forecast which indicated that Panalpina was experiencing a drastic increase in its cost of warehouse handling. (App. 795). Northeast agreed to this requested reduction as well. (App. 606). Thereafter, the only change in the rate for Turkish freight was an increase in the fall of 1989. (App. 1063-64).

During the same period in which the rate reductions took place, Mr. Detrick observed that Sylvan Friedman was a regular visitor to the Sterling warehouse. (App. 948). Mr. Detrick was also aware that Mr. Friedman had a copy of Northeast's contract with Panalpina, and knew the rates that Northeast was being paid thereunder. (App. 948).

Mr. Detrick also testified that, in early 1989, Panalpina began to impose other economic hardships on Northeast. These hardships included chargebacks unrelated to the warehouse contract, unreasonable demands for more personnel, and refusals to lease additional space. (App. 44). Mr. Detrick was able to describe a few examples of chargebacks occurring in early 1989, involving several hundred dollars. (App. 608-27).

Panalpina's alleged demands for increased staffing began in early 1989. (App. 627-29). The freight relating to the Turkey FMSP contract had completely filled the Sterling warehouse, and Panalpina determined that additional labor would be necessary to clear it out. (App. 628). Mr. Detrick believed that the solution to the warehouse problem was to increase the amount of available warehouse space, and requested Panalpina to do so. (App. 628-29, 633). Panalpina refused to lease more space, however, and between February and May 1989, Northeast gradually added five to seven employees to its staff. (App. 630-32).

In May 1989, the Detricks requested that Panalpina permit Fast Forward, Inc. ("Fast Forward") to take over the warehouse services contract from Northeast. (App. 366-67).[5] Panalpina agreed, and in September 1989, a new terminable at-will contract was executed between Panalpina, Fast Forward, and the Detricks. (App. 940). In connection with the new contract, petitioners requested an increase in the rate for Turkish freight to which Panalpina agreed. (App. 1063-64). These increased rates remained in effect until petitioners terminated their contract with Panalpina. (App. 1064). During this time period, Fast Forward obtained a security clearance from the Department of Defense and began handling classified freight at the Sterling facility for Panalpina. (App. 43, 950).

In February of 1990, Mr. Detrick advised Panalpina that he was having difficulty making payroll and paying his vendors. (App. 636-39). The following March or April, petitioners abandoned the warehouse contract because it had become unprofitable. (App. 636).

On March 19, 1990, Panalpina engaged Multi-Modal to

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5. Fast Forward was a company formed and wholly-owned by the Detricks.

replace petitioners as the warehouse service provider at the Sterling facility. (App. 798). Multi-Modal took over the Sterling warehouse the day after petitioners abandoned the contract, using former Fast Forward employees and equipment belonging to Fast Forward. (App. 948). Mr. Detrick testified that he observed that "within days, all of the obstacles which had destroyed Northeast were removed. More space was leased, rates were increased 50% or more, chargebacks were eliminated, equipment was purchased from Multi-Modal by Panalpina, expenses were paid." (App. 948). These observations caused Mr. Detrick to wonder "how Friedman could accomplish in such a short time all that I had been asking for so long." (App. 948).

Although petitioners had abandoned the warehouse services contract, they nonetheless insisted that they continue to handle classified freight at the Sterling facility. (App. 414). Panalpina agreed, and petitioners began providing services and invoicing for the handling of classified freight in April 1990. (App. 419). A formal classified services contract between petitioners and Panalpina was executed in August 1990. (App. 944). Petitioners continued to provide classified services out of the Sterling facility until January 1991, when, at the request of the Defense Investigative Service, they moved to a nearby location. (App. 409-11).

In addition, during the spring of 1990, both Guy and Donna Detrick were hired by respondent Multi-Modal. (App. 383-84, 422-23). The Detricks worked in Multi-Modal's offices located at the Panalpina warehouse, and had complete access to documents generated by that office. (App. 429-31). Mr. Detrick was hired as a salesman, and occasionally worked in Multi-Modal's office in Baltimore, where he had access to documents generated in that office. (App. 429-31). Mrs. Detrick performed clerical work at the Sterling warehouse. (App. 430).

In October or November 1990, Mr. Detrick discovered a Multi-Modal note and invoice which had been sent to Panalpina for classified packaging work. (App. 413). Mr. Detrick knew that Multi-Modal was not providing classified services to Panalpina, and concluded that the invoice was a phony. (App. 413). He later provided these documents to the government as part of what he believed to be evidence of illegal conduct at the Sterling warehouse. (App. 69-70).

Petitioners conducted no investigation or inquiry regarding the injuries they had suffered until a former Fast Forward employee approached Guy Detrick with allegedly suspicious invoices on March 11, 1991. (App. 319). On that same day, Mr. Detrick noticed a stack of documents sitting in plain view in the copy room at the Panalpina warehouse, which led him to conclude that Panalpina was involved in "something big" relating to its billing for inland freight. (App. 388-89).

On the evening of March 11, 1991, Mr. Detrick returned to the Panalpina warehouse and made copies of the documents he had seen earlier in the copy room, which had remained there undisturbed. (App. 391-93). Mr. Detrick took the documents home, studied them, and concluded that Panalpina was conducting an illegal "rebilling scheme" in the Sterling warehouse, and that this was the reason that he and his company were forced out of their contract with Panalpina. (App. 394, 948).

At a later date, Mr. Detrick returned to the Panalpina warehouse after business hours and took more documents relating to the alleged rebilling scheme. (App. 395). This time, he not only removed documents from the copy room, he also took documents that were in plain view on the desk of a Panalpina employee. (App. 396-98). Thereafter, Mr. Detrick continued to see documents relating to the alleged rebilling

scheme spread throughout the Sterling warehouse. (App. 434-35).

Petitioners began consulting various attorneys almost immediately concerning what causes of action they might have relating to the rebilling scheme. (App. 451-454). Petitioners also brought their findings to various government agencies, including the Internal Revenue Service, the State Department, the Department of Defense, and ultimately in the summer of 1991, to the United States Attorneys office for the Eastern District of Virginia. (App. 320-351). By this time, petitioners believed they had sufficient evidence to pursue claims against Panalpina. (App. 399). Indeed, during their meeting at the U.S. Attorney office, petitioners discussed the possibility of bringing a civil suit against Panalpina, perhaps a RICO claim. (App. 348-351). Petitioners did not file their claims, however, until March 1995, almost five years after they were allegedly forced to abandon their warehouse contract.

D. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, respondents hereby bring to the Court's attention the following misstatements of fact and/or inaccurate citations to the record contained in the petition:

1. Petitioners assert that they raised below the accrual rule formulated by this Court in *United States v. Kubrick*, 444 U.S. 111 (1979). (Pet. 10). Petitioners neither cited the *Kubrick* case nor argued the applicability of the *Kubrick* accrual rule to RICO claims in the District Court or the Court of Appeals.

2. Petitioners allege for the first time in this Court a conspiracy between Panalpina and Friedman to fraudulently overbill for warehouse services. Petitioners contend that they

stood in the way of this new objective of the rebilling scheme, and therefore were direct victims of the RICO rebilling scheme. As a preliminary matter, these assertions of fact are in no way supported, much less established, by the citations to the record. Indeed, the citations purporting to support this conspiracy to overbill for warehouse services are citations to petitioners' complaint and the invocation of the Fifth Amendment by several Panalpina employees. Petitioners' desire to rely upon "negative inferences" arising from the invocation of the Fifth Amendment by certain Panalpina employees does not substitute for evidence necessary to meet the burden of production on a motion for summary judgment. Moreover, none of the witnesses were even asked about any scheme to overbill for warehouse services. In fact, the whole idea of a conspiracy to overbill for warehouse services is not only unsupported, it is fanciful. Panalpina did not bill its FMSP customers for warehouse services, and thus could not possibly have fraudulently overbilled for warehouse services, even if it had wanted to do so. More to the point, there is no evidence whatsoever on the record even suggesting such a scheme.

3. Similarly, petitioners' allegation that respondents used the proceeds from the alleged racketeering activity to subsidize below-market rates for warehouse services is completely unsupported in the record. Indeed, such a suggestion is directly contradicted by the evidence of record which demonstrates that Panalpina paid Multi-Modal *higher* rates for warehouse services than it had previously been paying petitioners. (App. 948).

4. Although petitioners repeatedly assert that Panalpina engaged in rebilling activity designed to defraud the United States, there is no evidence to support that allegation. Indeed, Panalpina's relationships with its FMSP customers were strictly commercial, and the United States was not involved in any way in paying for Panalpina's transportation services.

REASONS FOR DENYING THE WRIT

I.

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DETERMINING THE CORRECT RULE OF ACCRUAL FOR CIVIL RICO CASES.

A. Petitioners' RICO Claims are of Extremely Dubious Validity.

Petitioners suggest that this case presents a paradigm of civil racketeering activity making it a particularly suitable vehicle for deciding a uniform rule of accrual for all civil RICO cases. However, petitioners' RICO claims are typical only in the sense that they demonstrate how far creative lawyers will seek to stretch routine commercial claims in order to obtain the enhanced remedies of civil RICO. When one puts aside the rhetoric and examines the facts, whatever injuries petitioners might have suffered had no relationship to the alleged racketeering activity. It is not surprising, therefore, that plaintiffs have struggled throughout this case to even articulate, much less support with evidence, a coherent theory of how they were harmed by the alleged RICO "rebilling" scheme.

The alleged rebilling scheme upon which petitioners base their RICO claims involved the submission of marked up trucking bills to Panalpina's FMSP customer. Petitioners, who operated Panalpina's warehouse, were obviously not direct victims of this alleged scheme since they were not Panalpina's customer. Consequently, petitioners sought to argue below that they were injured by the investment of proceeds of the rebilling activity. However, petitioners have never been able to explain exactly how the proceeds were invested, or how they were injured by that investment.

Initially, petitioners claimed that they were forced to abandon their at-will warehouse contract so that the rebilling scheme could begin. When Panalpina pointed out that petitioners could hardly be injured by the investment of the proceeds of rebilling which did not commence until after petitioners had already suffered all of their injuries, petitioners claimed that the rebilling had begun prior to the time they were forced out of the warehouse. This new theory still did not explain how the proceeds of the rebilling had been invested in a manner in which to injure petitioners.

Accordingly, petitioners later asserted yet another theory of causation, claiming that the retention of the proceeds of prior rebilling undertaken by the "Friedman enterprise" with another company was the investment of proceeds upon which they relied. Petitioners argued that the investment of these proceeds in the "Friedman enterprise" lured Panalpina into the rebilling scheme. This third theory of causation is highly suspect because the proceeds upon which petitioners rely arose from different and separate rebilling activity unrelated to Panalpina. In addition, established case law provides that the mere retention of the proceeds of racketeering activity is not sufficient to establish causation under § 1962(a). *See, e.g., Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1188 (3d Cir. 1993); *Pemberton Sales & Serv. v. Banco Popular de P.R.*, 877 F. Supp. 961 (D. V.I. 1994); *Princeton Economics Group, Inc. v. Am. Tel. & Telegraph Co.*, 768 F. Supp. 1101 (D. N.J. 1991); *Grove Fresh Distrib. Inc. v. Flavor Fresh Foods, Inc.*, 720 F. Supp. 714 (N.D. Ill. 1989); *Teti v. U.S. Healthcare*, Nos. 88-9808, 88-9822, 1989 WL 157090 at *1 (E.D. Pa. 1989), *aff'd mem.*, 904 F.2d 696 (3d Cir. 1990); *In re Rexplore Inc. Sec. Lit.*, 685 F. Supp. 1132 (N.D. Cal. 1988).

In the petition, petitioners have advanced a new theory of causation. Petitioners now suggest that the proceeds of the

rebilling activity were used to subsidize below-market rates paid to Friedman/Multi-Modal when they replaced petitioners as the operators of Panalpina's warehouse. Petitioners apparently suggest that they were harmed because the proceeds of racketeering activity were used to subsidize their competitor. Once again, however, the evidence of record does not support petitioners' theory of causation. Nothing in the record suggests that Multi-Modal was paid below-market rates for providing warehouse services. Indeed the uncontested evidence of record is that Panalpina paid Multi-Modal higher, rather than lower, rates than petitioners were receiving under their warehouse contract. (App. 948). Accordingly, the proceeds of rebilling were not used to subsidize petitioners' competitor, and petitioners were not the direct or indirect victims of the rebilling scheme.

Petitioners also argue that the circumstances of this case demonstrate a clear distinction between the application of a pure "injury discovery" rule and an accrual rule requiring discovery of the source of the injury. However, this is not a case in which a party failed to discover the existence of racketeering activity until more than four years after the injury occurred. In this case, petitioners discovered the alleged racketeering activity eleven months after they abandoned the warehouse contract — well within the four-year limitations period provided under the "injury discovery" rule of accrual. Upon discovering the alleged rebilling scheme and recognizing that they had a potential RICO action against respondents, petitioners waited almost four more years to commence this action.[6] Consequently, petitioners were not

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6. Although petitioners have never explained why they waited so long to bring this action, petitioners used the interim period to go through bankruptcy proceedings to discharge their substantial debts before bringing this action. The causes of action asserted in this action, were not listed among petitioners' assets during their respective bankruptcies, although petitioners

(Cont'd)

prejudiced by the application of the "injury discovery rule", but rather by their own decision to delay filing until the limitations period had expired.[7]

This Court's recent actions in twice granting certiorari on the accrual issue suggest that the Court believes the time is right to establish a uniform accrual rule. However, this Court should not determine a rule of accrual for all civil RICO cases based on the facts and circumstances in this case — which presents none of the typical issues relating to the accrual of a true RICO claim.[8]

B. Petitioners Never Sought Application of the *Kubrick* Rule in the District Court or the Court of Appeals.

Petitioners did not argue below for the adoption of the *Kubrick* accrual rule; it was not even mentioned in any of their briefs filed in the District Court or the Court of Appeals.[9] Thus,

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(Cont'd)
were well aware of their claims. Petitioners advised their respective trustees of the existence of the claims asserted in this action only when respondents sought to have petitioners dismissed as improper plaintiffs. This occurred years after they had received discharges from bankruptcy.

7. Moreover, petitioners cannot credibly argue that the existence or application of the "injury discovery" rule set forth in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987) was somehow unclear.

8. Petitioners also suggest that criminal charges and convictions relating to the government's investigation of rebilling demonstrate that real criminal racketeering took place. However, the government has neither charged, nor convicted, anyone of racketeering relating to rebilling.

9. In the Court of Appeals, petitioners primarily argued that the District Court had failed to properly apply *Pocahontas* to the case before it. The (Cont'd)

the courts below were not presented with, nor did they decide, the substantive issue pressed in the instant petition for certiorari.

This Court's practice generally precludes the grant of certiorari where the issue was not presented or passed upon below. *United States v. Williams*, 504 U.S. 36, 40 (1992).[10] "Ordinarily, [the Supreme Court] does not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citing *Youakim v. Miller*, 425 U.S. 231 (1976)). *See also Holly Farms Corp. v. N.L.R.B.*, 116 S. Ct. 1396 (1996) (citing *Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 116 S. Ct. 873 (1996)). In *Holly Farms*, this Court, declined to entertain an argument not advanced below. 116 S. Ct. 1402, n. 7. Only where a case presents exceptional circumstances will the Court depart from its usual practice and consider issues not raised below. *See, e.g., United States v. Alvarez-Sanchez*, 511 U.S. 350, 360, n. 5 (1994) ("[f]inding no exceptional circumstances that would warrant reviewing a claim that was waived," this Court adhered to its general practice and declined to address respondent's Fourth Amendment argument.)

(Cont'd)
District Court held that plaintiffs' claims were time barred because plaintiffs suffered the injury in April 1990, and they did not commence the lawsuit until March 1995, outside the 4-year statute of limitations established by the Supreme Court in *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987).

10. The fact that Court's practice does permit review of an issue not pressed below as long as that issue was passed upon, *United States v. Williams*, 504 U.S. 36, 40-41 (1992), does not alter the application of this practice to the instant petition. Here, neither the District Court nor the Court of Appeals passed upon the question of the applicability of the *Kubrick* rule of accrual to the present action.

This particular case presents no compelling reasons or exceptional circumstances why the Court should depart from its traditional practice precluding the grant of certiorari when the question presented was not pressed or passed upon below. Furthermore, because the question raised in the petition for certiorari was not presented to the courts below, this Court is deprived of the benefit of reviewing the reasoning and practical experience of each of the courts below in its consideration of the issues before it. Additionally, different factual and policy consideration would bear on the application of the *Kubrick* rule. These considerations are more properly developed in the trial court.

C. Application of the *Kubrick* Accrual Rule to this Case Would Not Change the Outcome.

The Court should refuse to grant certiorari as this case is not the appropriate means of addressing the *Kubrick* accrual rule for civil RICO cases. Petitioners' claims would be time barred even if the *Kubrick* rule were applied in this case.

1. The Kubrick Rule of Accrual Requires Only That a Plaintiff Have Constructive Knowledge That a Defendant Caused His Loss, Not That Plaintiff Know the Exact Nature of His Claim.

In *United States v. Kubrick*, 444 U.S. 111 (1979), this Court defined a rule of accrual for medical malpractice claims under the Federal Tort Claims Act. This Court held that a medical malpractice cause of action accrues when plaintiff knows of both her injury and the putative cause of her injury. The Court distinguished between knowledge of the probable causation and knowledge of the nature of the claim. *Id.* at 123-24. In other words, *Kubrick* does not require a plaintiff to know the exact nature of his claim in order for the cause of action to accrue.

Rather, *Kubrick* requires only that plaintiff have knowledge of his injury and constructive knowledge that a defendant caused his loss. Moreover, the injured plaintiff need not know which cause, if many are possible, is the governing cause. The plaintiff only needs to know or have reason to know of a potential cause.

The *Kubrick* rule of accrual, thus, imposes on an injured plaintiff an affirmative duty to investigate the potential cause of his injury after he has discovered his loss or injury. *Fries v. Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990) (quoting *Kubrick*, 444 U.S. at 123). In *Kubrick*, this Court stated that when plaintiffs have knowledge of the critical facts concerning their injuries, they are charged with a duty to investigate promptly and present any claim for relief. 444 U.S. at 123. Hence, a plaintiff has an affirmative duty to inquire as to the legal cause of his injury (or the nature of his claim) after becoming aware of the existence of the injury and its potential cause. This affirmative duty to investigate has been widely applied in medical malpractice cases arising under the Federal Tort Claims Act. *See, e.g., Chamness v. United States*, 835 F.2d 1350 (11th Cir. 1988); *Nemmers v. United States*, 795 F.2d 628 (7th Cir. 1986), *on remand*, 681 F. Supp. 567 (C.D. Ill. 1988), *aff'd*, 870 F.2d 426 (7th Cir. 1989); *Arvayo v. United States*, 766 F.2d 1416 (10th Cir. 1985); *Gilbert v. United States*, 720 F.2d 372 (4th Cir. 1983); *Mendez v. United States*, 732 F. Supp. 414 (S.D.N.Y. 1990); *Oberlin v. United States*, 727 F. Supp. 946 (E.D. Pa. 1989); *Cragin v. United States*, 684 F. Supp. 746 (D. Me. 1988); *Dessi v. United States*, 489 F. Supp. 722 (E.D. Va. 1980).

In sum, under *Kubrick*, once the duty to investigate arises (*i.e.*, when a plaintiff has knowledge of his injury and its potential cause), the statute of limitations begins to run against the potential claims.

2. Applying the Kubrick Rule of Accrual to the Facts of this Case Would Not Alter the Outcome — Petitioners' Claims Would Still Be Barred.

Petitioners admit that under *Kubrick*, once a plaintiff is aware that he has sustained a loss and that the loss could have been caused by a putative defendant, it is reasonable to put the plaintiff to the burden of exercising diligence to investigate, to retain counsel, and to bring suit within the limitations period. (Pet. 15). This means that under the *Kubrick* rule, a RICO plaintiff has four years to bring his claims from the time he discovers his loss and that the loss has been caused by a putative defendant. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987) (adopting a uniform four-year statute of limitation in civil RICO actions).

In this case, petitioners waited more than four years to commence this action from the time they had this essential knowledge. In April 1990, petitioners admittedly knew that they had sustained an economic loss — the relinquishment of the warehouse contract. (Pet. 14). However, petitioners also knew in April 1990 that Panalpina — which had imposed the rate cuts and other economic hardships leading to the abandonment of the warehouse contract — was the putative cause of their injury. Thus, in April 1990, petitioners had knowledge of the essential facts which, even under *Kubrick*, started the limitations clock running and charged them with the affirmative duty to investigate the nature of their claims.

Although petitioners admit that they had reason to know that they had a potential contract action, (Pet. 18), they argue that they had no knowledge that they had a potential RICO action. *Kubrick* made clear, however, that knowledge of the exact nature of the claim is not required for the claim to accrue. Petitioners had four years from April 1990 to investigate and

discover their RICO claim. As events turned out, petitioners *did* discover their alleged RICO claim within the allotted four years. They had more than three years from that discovery to bring suit; they simply neglected to file in time.[11]

II.

KUBRICK IS NOT THE APPROPRIATE STANDARD FOR CIVIL RICO CASES AND IS CONTRARY TO THE POLICIES UNDERLYING STATUTES OF LIMITATION.

The *Kubrick* holding was narrowly tailored to decide the specific question of when a claim accrues within the meaning of the Federal Tort Claims Act. The ruling was fashioned as an exception to the general rule that "limitations begin to run from the time the plaintiff could sue," *i.e.*, when the right of action is complete. *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 598 (1895). The *Kubrick* standard was developed in the narrow context of medical malpractice, where it is sometimes difficult to determine that an injury was caused by a putative defendant. This explains why most courts have restricted the application of *Kubrick* to medical malpractice cases. *See, e.g., Wilkinson v. United States*, 677 F.2d 998 (4th Cir.), *cert. denied*, 459 U.S. 906 (1982); *Wollman v. Gross*, 637 F.2d 544 (8th Cir. 1980).

Only in latent tort cases, such as occupational disease cases, toxic substance litigation and product liability actions against drug manufactures, has the *Kubrick* standard been extended beyond the medical malpractice arena. *Dubose v. Kansas City Southern Ry.*, 729 F.2d 1026 (5th Cir. 1984) (occupational

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11. Petitioners also argue that the pendency of *Klehr v. A.O. Smith Corp.*, No. 96-663, before this Court somehow mandates grant of certiorari in this case. However, whatever the result in *Klehr*, this case is especially poorly suited to serve as the test case for determining the appropriate accrual rule for civil RICO cases, as discussed more fully above.

disease); *Stoleson v. United States*, 629 F.2d 1265, 1269 (7th Cir. 1980) (occupational disease); *Yustick v. Eli Lilly & Co.*, 573 F. Supp. 1558 (E.D. Mich. 1983) (drug manufacturer liability); and *Moll v. Abbot Lab.*, 482 N.W. 2d 197 (Mich. App. 1992) (drug manufacturer liability). These types of cases are similar enough to the medical malpractice context to warrant a clear "source of the injury rule." In contrast, the policies that justified the application of the *Kubrick* accrual rule in those cases, do not apply to RICO actions. There are no parallels between the tort claim presented before the Court in *Kubrick* and the typical RICO claim. The fact of injury, as well as the identity of the putative defendant, is not generally difficult to determine in a RICO case.

Furthermore, applying the *Kubrick* rule of accrual would be contrary to the policies underlying statutes of limitations. In general, causes of action accrue and statutes of limitations begin to run when there is a "complete and present cause of action." *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *see also Moline Plow Co. v. Webb*, 141 U.S. 616, 623 (1891). The underlying policy and purpose of statutes of limitation is to

> promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim, it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Railroad Telegraphers v. Ry. Express Agency, Inc., 321 U.S.

342, 348-49 (1944).[12] The accrual rule urged by petitioners is contrary to this policy and purpose — it is an open-ended standard setting no outer limits for when a plaintiff must bring his or her claims.

CONCLUSION

For all the foregoing reasons, this case is not an appropriate means of addressing the issue raised by the petition. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD D. GREENBERG
Counsel of Record
DAVID K. MONROE
HELLE R. WEEKE
GALLAND, KHARASCH
& GARFINKLE, P.C.
Attorneys for Respondents Panalpina, Inc. and Panalpina Airfreight, Inc.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
(202) 342-5200

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12. This Court in *Kubrick*, quoting with approval from *Railroad Telegraphers v. Ry. Express Agency*, 321 U.S. 342 (1944), went on to state that statutes of limitations "protect defendants and the court from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." 444 U.S. at 117.

(3)

No. 96-1820

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

H. JASON GOLD, in his Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in his Capacity as Chapter 7 Trustee for Donna Detrick, and FAST FORWARD, INC.,

Petitioners,

—v.—

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA, and SYLVAN FRIEDMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARTIN E. KARLINSKY, ESQ.
(Counsel of Record)
ROBERT P. STEIN, ESQ.
MICHAEL A. LEVY, ESQ.
ADAM S. ZIFFER, ESQ.
CAMHY KARLINSKY & STEIN LLP
1740 Broadway, 16th Floor
New York, New York 10019-4315
(212) 977-6600

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No. 96-1820

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

H. JASON GOLD, in his Capacity as Chapter 7 Trustee for Guy R. Detrick, GORDON P. PEYTON, in his Capacity as Chapter 7 Trustee for Donna Detrick, and FAST FORWARD, INC.,

Petitioners,

vs.

PANALPINA, INC., PANALPINA AIRFREIGHT, INC., MULTI-MODAL FREIGHT SYSTEMS, INC., MULTI-MODAL FREIGHT SYSTEMS OF VIRGINIA, and SYLVAN FRIEDMAN,

Respondents.

PETITIONERS' REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Preliminary Statement

Petitioners H. Jason Gold, in his capacity as Chapter 7 Trustee for Guy R. Detrick, Gordon P. Peyton, in his capacity as Chapter 7 Trustee for Donna Detrick, and Fast Forward, Inc., submit this reply brief in further support of their petition for a writ of certiorari (the "Petition") to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on March 18, 1997.

After the filing of the Petition in this case on May 19, 1997, the Court handed down its decision in *Klehr v. A.O. Smith Corp.*, ___ U.S. ___, No. 96-663 (decided June 19, 1997). In *Klehr*, the Court rejected the "last predicate act" rule—the only rule that would have rendered petitioners' claims timely there—as a rule of accrual for civil actions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). *Klehr* at 5-10.[1] The seven member majority of the Court declined, however, to resolve the long-standing conflict among the courts of appeals regarding the proper accrual rule for RICO claims. *Id.* at 10. Having first reviewed the somewhat strained application of the legal principles at issue to the facts of *Klehr*, Justice Breyer wrote for the Court:

> In these circumstances, we believe we should not consider differences among the various discovery accrual rules used by the Circuits. The legal questions involved may be subtle and difficult. Compare [*Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 239 (8th Cir. 1996)] (claim accrues with discovery of existence *and source* of injury, plus pattern) with [*Bivens Gardens Office Bldg. Barnett Bank*, 906 F.2d 1546, 1554 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991)] (claim accrues with discovery of injury and pattern); *see also* [*Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 1991)] (describing differences among various discovery rules and doctrines of "equitable tolling" and "equitable estoppel"). And the facts of this case do not force focused argument as to how the traditional Clayton Act "injury" accrual

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[1] Citations to *Klehr* are to the pages of the Bench Opinion handed down on the day of decision.

> rule, principles of equitable tolling, and doctrines of equitable estoppel should interact in circumstances where the application of one, or another, of these different legal doctrines would make a significant legal difference. * * * We shall, at the very least, wait for a case that clearly presents these, or related issues, providing an opportunity for full argument, before we attempt to resolve them. *Id.* at 12 (emphasis added).

This is that case. Contrary to the assertions advanced by respondents in their Brief in Opposition ("Br. Opp."), this case "force[s] focused argument" on the principal conflicts among the courts of appeals—whether the discovery of injury alone, existence *and source* of injury, or injury and pattern, constitutes the proper RICO accrual rule. Under the first rule, petitioners' RICO claims are time-barred, while under either of the latter two rules the racketeering claims here may proceed to trial on remand to the district court.[2]

II. The State Of The Record In This Court

Respondents fail to address the substance of the Petition in their opposition; they fail to show why the Court should not review this case and why it is not an appropriate vehicle to address the "subtle and difficult" issues of RICO claim accrual. Instead, purporting to invoke Supreme Court Rule 15.2, respondents would have the Court believe that Petitioners have sought to mislead the Court as to the facts, and that, as a result, the case is not suited for review here. (Br. Opp. at 9-10, 14 n.8). This attempt to deflect attention from the very serious

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[2] Petitioners discovered the "pattern" of RICO predicate acts shortly after discovery of the source of their injury. *See* Petition at 8.

charges petitioners have made and from the very serious and concrete issues this case raises, however, is unavailing.

Contrary to respondents' assertions, the opinion of the Fourth Circuit speaks for itself, resolving this alleged "dispute" over the state of the record in this Court unequivocally in petitioners' favor. The Fourth Circuit found the record more than adequate to demonstrate that petitioners had stated a valid claim under RICO, that they had been injured by respondents' racketeering scheme, and that the racketeering injury sustained was serious and consequential, involving, as it did, fraud on the United States and foreign governments, the perversion to criminal ends of an important United States foreign policy program (the Foreign Military Sales Program), and proven criminal wrongdoing for which one respondent stood convicted and for which another today stands under indictment. The more significant facts found and articulated by the Fourth Circuit in its opinion include those quoted below.[3]

> —Facts discovered since 1991 show that in 1988, Friedman and Multi-Modal, acting together with agents of Daniel F. Young, Inc. . . . devised a 'rebilling' scheme to defraud the United States and foreign governments participating in the [Foreign Military Sales Program]. (App. 10a, n.4)

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[3] This case comes before the Court following the district court's granting of respondents' motion for summary judgment on the bar of the statute of limitations, and the court of appeals affirmance of that order. Consequently, the record before the Court consists not of trial proceedings, but rather of the affidavits, deposition testimony, and pleadings on the summary judgment motion. *See* Fed. R. Civ. P. 56(c). In this procedural posture, the facts—and the inferences to be drawn from those facts—must be viewed "in the light most favorable" to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

> —In the Spring of 1989, Friedman solicited Panalpina to join the rebilling scheme conspiracy, and the scheme expanded. (*Id.*)
>
> —Thereafter, Friedman wanted Multi-Modal to receive more of the ill-gotten gains, and hence, decided that if Friedman could assume control of the warehouse operation presently operated by the Detricks, Friedman would be able to increase the amount of proceeds from the rebilling scheme. As a result, Friedman devised a plan to force the Detricks out of business by subsidizing below-competition rates and paying 'kickbacks' to various Panalpina employees. (App. 10a-11a, n.4)
>
> —[a]ll Panalpina's officers and employees who were involved in the rebilling scheme have invoked their Fifth Amendment privileges against self-incrimination. (*Id.*)
>
> —Some time [after the Detricks' cooperation with federal law enforcement], Friedman entered a guilty plea on criminal charges relating to the rebilling conspiracy and employees of D.F. Young were convicted at trial with respect to the rebilling scheme. The investigation of Panalpina and its officers, agents, and employees continues. (*Id.* 11a, n.5)

The facts of this case, then, present a paradigm of the course and development of a civil racketeering claim. They cogently force attention to the issue of RICO claim accrual, and illuminate the various accrual rules that have been adopted by and which now divide the courts of appeals. This case is the correct vehicle to resolve the long-standing conflicts that the Court, in this last Term, declined to resolve.

III. The Reasons For Granting The Writ Stand Unrefuted Before This Court

Respondents' legal arguments are equally misleading. Respondents' principal argument—that the RICO claims here are substantively deficient (Br. Opp. at 11-14)—is merely an attempt to create a phantom factual dispute on a wholly collateral issue. Both the district court and the Fourth Circuit correctly held that petitioners had stated a claim for relief under RICO. The central issue decided by the Fourth Circuit, and the *only* issue to be reviewed in this Court, is the appropriate RICO accrual rule; the Fourth Circuit panel was constrained to apply its circuit's "injury discovery" rule, while this Court must determine which rule is the correct one. As demonstrated in the Petition, the facts of this case inexorably compel an answer to that question. Respondents' primary argument is irrelevant to the application for certiorari.

Moreover, respondents' three-page factual recitation allegedly showing the deficiency of petitioners' claims is merely an inappropriate endeavor to have this Court decide a matter—the facts relevant to the legal issue of timeliness—developed in the district court and confirmed by the court of appeals, and that the Court should not and need not decide. As made clear in the court of appeals opinion, petitioners' allegations and proofs are plainly sufficient to present a valid RICO claim under section 1962(a) for respondents' use of racketeering proceeds to injure petitioners in their business. *See* App. at 9a-11a and nn.3-5.[4] In short,

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[4] As the Fourth Circuit's opinion plainly discloses, and contrary to respondents' contentions (Br. Opp. at 11-13), petitioners' Section 1962(a) RICO claims also fully satisfy the applicable standard of loss causation. *See Busby v. Crown Supply, Inc.*, 896 F.2d 833, 838 (4th Cir. 1990) (Section 1962(a) claim lies when a plaintiff is "injured *in the process* of the [RICO enterprise's] receipt and use of the illegally obtained income." (emphasis in original)).

in the present posture of this case the substantive validity of petitioners' RICO claims is neither subject to dispute nor properly before the Court.[5]

Respondents' secondary argument rests upon the contention that petitioners did not press, as they do here, for the application in the lower courts of the accrual rule enunciated in *United States v. Kubrick*, 444 U.S. 111 (1979). (Br. Opp. at 14-16).[6] This argument is frivolous in the extreme. Petitioners were constrained by governing precedent in the Fourth Circuit, which applies the pure "injury discovery" accrual rule, and accordingly urged that the rule required knowledge of *more* than discovery of "mere economic loss." (App. at 18a-19a) For petitioners to have urged the Fourth Circuit panel to reject its accrual rule would have been an exercise in futility, as the settled rule in the Fourth Circuit, as in most circuits, is that only the entire court may overrule a decision of a prior panel. *Brubaker v. City of Richmond*, 943 F.2d 1363, 1381-82 (4th Cir. 1991).[7]

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[5] The Court similarly declined the invitation to reexamine the independent factual conclusions of the two lower courts in *Klehr*, particularly because the alleged error was beyond the scope of the questions presented on certiorari. *Klehr* at 12-13, 15. The questions presented in the Petition here are likewise purely legal questions addressing only the appropriate RICO accrual standard.

[6] Contrary to respondents' contention (Br. Opp. at 9), petitioners *never* asserted that they cited *Kubrick* to the lower courts. The phrase petitioners used—"As petitioners *urge* below," (Petition at 10)—is in the present tense and clearly refers to the *argument* that follows, not to the proceedings in the lower courts, a reference that would have required the use of the *past* tense.

[7] In recognition of this principle, petitioners stated in their brief below:

> Appellants recognize that even if this Court were inclined to alter the rule in [*Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987)], it cannot "overrule a prior panel of this circuit." *Brubaker v. City of Richmond*, 943

(continued...)

Moreover, the very authorities respondents cite make abundantly clear that only an *issue*, not a particular *precedent*, must be pressed or passed on in the lower courts in order to preserve it for review in this Court.[8] The *issue* before the Fourth Circuit in this case was whether petitioners' claims were timely under the RICO accrual rule applied in the Fourth Circuit. That, at bottom, is the same issue presented here, with the difference that in this Court petitioners are free to urge that the Court should adopt a rule that, however applied, will render their claims timely.

Respondents next argue that even were the Court to apply the *Kubrick* rule, the outcome in this case would not change, because *Kubrick* purportedly "imposes on an injured plaintiff an affirmative duty to investigate the potential cause of his injury after he has discovered his loss or injury." (Br. Opp. at 16) The *Kubrick* rule does no such thing. It commences the running of the statute when the putative plaintiff learns "he has been hurt *and who has inflicted the injury*." 444 U.S. at 122 (emphasis added). Only *then* does the duty to investigate arise. As the court of appeals here found, petitioners were falsely told by respondents that legitimate competition had caused their

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[7] (...continued)

F.2d 1363, 1381-82 (4th Cir. 1991). . . . Should the panel of this Court hearing this appeal disagree with our analysis that the *Pocahontas* rule is a [rule] that requires something more than the existence of economic loss to trigger the running of the limitations period, we respectfully reserve the right to petition the Court for rehearing *en banc* to urge the adoption of a different accrual rule or to seek review in the United States Supreme Court of this difficult question that has divided the circuit courts.

[8] *See, e.g., United States v. Williams*, 504 U.S. 36, 41-42 (1992) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law," citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8).

injury; they believed this until discovery of the respondents' racketeering scheme. *See* App. at 9a-11a and nn. 3-4.[9] Under either the *Kubrick* rule or the "pattern" rule, only the discovery of the unlawful scheme triggers the statute of limitations. Either rule renders petitioners' claims timely.

Finally, respondents argue that the *Kubrick* rule is inappropriate for RICO claims. (Br. Opp. at 19-21) This contention ignores and is belied by the precedents of four courts of appeals which require discovery of injury *and its source* as a component of their accrual rules. *See Caproni v. Prudential Securities Incorporated*, 15 F.3d 614, 619-20 (6th Cir. 1994); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820 (10th Cir. 1990), *rev. on other grounds*, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354 n.1 (1991); and *Bivens Gardens Office Bldg. v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). Each of these cases enunciates a test which requires discovery of injury *and its source*, plus pattern. *See also Klehr* at 12 (discussing various accrual rules including "discovery of existence *and source* of injury, plus pattern" (emphasis in original)). The very conflict among the circuits which calls for review in this Court shows that four of the circuits have adopted a rule that not only incorporates the *Kubrick* rule, but adds an element that permits greater liberality of application. Contrary to the suggestion of respondents, the rule of accrual petitioners press is neither foreign to the RICO context nor alien to the rules that the courts of appeals have already applied to RICO accrual.

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[9] These findings by the court of appeal also undercut respondents' disingenuous factual contention that because petitioners' contract was with Panalpina and their injury consisted of the loss of the contract, petitioners knew the source of the injury when the loss occurred. (Br. Opp. at 18)

In the post-*Klehr* regime, a rule requiring discovery of injury and its source represents the appropriate middle ground between those circuits requiring discovery of injury alone and those requiring discovery of injury and its source, plus pattern. *See* Petition at 16-17. The *Kubrick* formulation is such a rule, and it should be adopted as the uniform standard for accrual of civil RICO claims. It advances the appropriate remedial purposes of RICO yet at the same time honors the policies of statutes of limitations of repose and diligence.

* * *

IV. Conclusion

For the various reasons set forth herein and in the Petition, this petition for a writ of certiorari should be in all respects granted.

Respectfully submitted,

MARTIN E. KARLINSKY, ESQ.
(Counsel of Record)
ROBERT P. STEIN, ESQ.
MICHAEL A. LEVY, ESQ.
ADAM S. ZIFFER, ESQ.
CAMHY KARLINSKY & STEIN LLP
1740 Broadway, 16th Floor
New York, New York 10019-4315
(212) 977-6600

Attorneys for Petitioners

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